THE NORTH CAROLINA STATE BAR

JOURNAL

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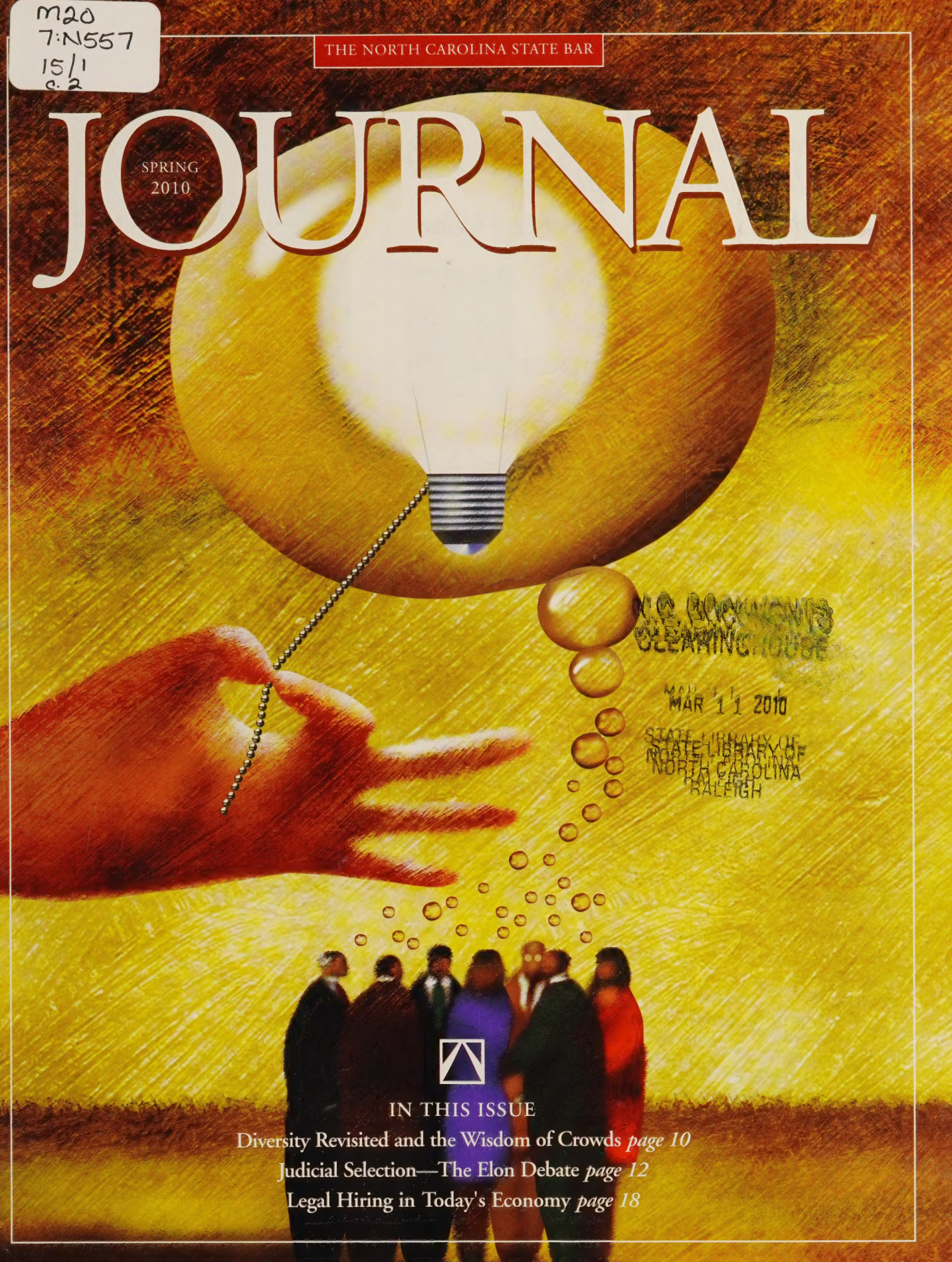
2010



IN THIS ISSUE

We want your fiction!

Historical Fiction *Romance*
International Espionage
Humor *Science Fiction*

Seventh Annual Fiction Writing Competition

The Publications Committee of the *Journal* is pleased to announce that it will sponsor the Sixth Annual Fiction Writing Competition in accordance with the rules set forth below. The purposes of the competition are to enhance interest in the *Journal*, to encourage writing excellence by members of the bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. If you have any questions about the contest, please contact Jennifer Duncan, Director of Communications, North Carolina State Bar, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net; 910.397-0353.

Rules for Annual Fiction Writing Competition

The following rules will govern the writing competition sponsored by the Publications Committee of the *Journal*:

1. The competition is open to any member in good standing of the North Carolina State Bar, except current members of the Publications Committee. Authors may collaborate, but only one submission from each member will be considered.

2. Subject to the following criteria, ***the story may be on any fictional topic and may be in any form*** (humorous, anecdotal, mystery, science fiction, etc.—***the subject matter need not be law related***). Among the criteria the committee will consider in judging the articles submitted are: quality of writing; creativity; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The committee will not consider any article that, in the sole judgment of the committee, contains matter that is libelous or violates accepted community standards of good taste and decency.

3. All articles submitted to the competition become property of the North Carolina State Bar and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

4. ***Articles should not be more than 5,000 words in length*** and should be submitted in an electronic format as either a text document or a Microsoft Word document.

5. Articles will be judged without knowledge of the identity of the author's name. Each submission should include the author's State Bar ID number, placed only on a separate cover sheet along with the name of the story.

6. All submissions must be received in proper form prior to the close of business on May 28, 2010. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Jennifer Duncan, 6568 Towles Rd., Wilmington, NC, 28409; ncbar@bellsouth.net.

7. Depending on the number of submissions, the Publications Committee may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the committee. Contestants will be advised of the results of the competition. Honorable mentions may be announced.

8. The winning article, if any, will be published. The committee reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the committee not to be of notable quality.

Deadline is May 28, 2010

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Jennifer R. Duncan

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Update Membership Information: Members who need to update their membership information must do so by contacting the Membership Department via one of the four following methods: (1) log on to the Member Access section of the State Bar's website (www.ncbar.gov); (2) mail changes to: NC State Bar, PO Box 25908, Raleigh, NC 27611-5908; (3) call (919) 828-4620; or (4) send an e-mail to lchildree@ncbar.gov. **In deciding what address to list with the State Bar, be advised that this address will be used for all official correspondence from the State Bar and that membership information is a public record pursuant to the NC Public Records Act.**

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BAR UPDATES

DEPRESSION, STRESS, CAREER ISSUES, AND ADDICTIONS. BELIEVE IT OR NOT, THIS IS AN UPLIFTING STORY.

Actually, there are many stories. Every one of them about someone in the legal field.

Lawyers are as vulnerable to personal and professional problems as anyone else.

Competition, constant stress, long hours, and high expectations can wear down even the most competent and energetic lawyer. This can lead to depression, stress, career problems, relationship issues, financial problems, or alcohol and substance abuse.

So where's the uplifting part? That's where we come in.

The Lawyer Assistance Program was created by lawyers for lawyers. While we started as a way for attorneys to deal with alcohol related problems, we now address any personal issue confronted by those in the legal profession.

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If you have a personal issue, or know someone who does, we can be the crucial first step in turning things around, a role we've played for many of your peers.

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We can help if you get in touch with us.

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FRIENDS

FOR THE ISSUES OF LIFE IN LAW

Finishing School

By Barbara B. Weyher

"Is that the best you can do?" Those were the words I heard from my senior partner, Charlie Young, when I handed him my first research memorandum after starting with Young Moore Henderson & Alvis in 1979. Charlie was not being critical of my memo—in fact, he had not even read it. He was conveying to me, as he did to all the young associates, that I should not hand him the memo unless and until it was the best work I could do. He expected excellence.

As had been the case with many before me, there was silence in the room as his question to me sunk in. I looked down at the memo, pondered a minute, and then told Charlie I would work to make it better.

Even after 30+ years of practice, I often think about the many valuable lessons I learned from Charlie Young and the other outstanding lawyers for whom I was fortunate to work. I cannot imagine navigating my way through the complexities and nuances of a law practice without the benefit of their early guidance.

The American poet Ruth Whitman described this same process of development in the life of a young artist:

> In every art beginners must start with models of those who have practiced the same art before them. And it is not only a matter of looking at the drawings, paintings, musical compositions, and poems that have been and are being created; it is a matter of being drawn into the individual work of art, of realizing that it has been made by a real human being, and trying to discover the secret of its creation.

Young lawyers can likewise read cases, statutes, and ethics rules. But reading the law should not be a substitute for experiencing firsthand the dynamics of law practice through the work and guidance of a mentor.

It was not until the early 1900s that law schools became the norm for legal education. Until then, most lawyers were trained through apprenticeship and "reading" the law. Young lawyers learned from observing and then testing the waters under a guiding hand. The growth of law schools was, of course, a positive development in that it brought more consistency and breadth to legal education. In my view, though, law school does not replace the need for apprenticeship.

This past year a record number of people took the LSAT. Law school applications were up significantly. In North Carolina, the Board of Law Examiners administered the July bar exam to 1,120 applicants, an all-time high.

Like a perfect storm, this increase in the number of people applying to, and graduating from, law school is occurring even as many firms are laying off lawyers, deferring the start dates of recent hires, implementing hiring freezes, and cancelling interviews on campus. At the same time law school tuition continues to rise, with the average debt for law students at approximately $88,000 (private law schools) and $58,000 (public law schools).

Solo practice has become the only option for some graduates. Saddled with debt, they must hang out a shingle without any training in law office management. Much worse, they do not have the benefit of a Charlie Young to help them develop from raw and green to well-seasoned. In the short term and the long term, this is a costly loss for both these young lawyers and the profession as a whole.

To address this vacuum, the State Bar Council recently voted to amend the CLE rules to establish a 12-hour mandatory program for newly licensed attorneys which must be taken in their first full year of practice. This New Admittee Professionalism Program, presented in two six-hour blocks, will include instruction in professionalism, ethics, and law office management, including trust accounting. It must be attended in person, rather than online or by replay. The change does not require more CLE hours for first year lawyers—it simply requires that their 12 mandatory CLE hours in their first year of practice be taken through the State Bar New Admittee Professionalism Program. The NCBA is working to be in a position to offer this course by January 1, 2011, when the new rules go into effect. The Bar Association will provide this CLE at a reduced rate, which will no doubt be

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Bar 44, Where Are You?

By L. Thomas Lunsford II

My predecessor in this office, Bobby James, was extremely proud to have gotten his start in the practice of law in High Point. Although he practiced there for only a couple of years, he gleaned from the experience a lifetime of stories and observations about the characters and the character of that very distinguished Bar. He was profoundly affected by the place. Indeed, when I first met him, more than 20 years after he had joined the State Bar staff and moved to Raleigh, his worldview was still in many ways High Pointcentric. Very few things within the purview of the State Bar could be adequately understood without reference to his professional sojourn in the southwest corner of Guilford County.

Ever the philosopher and political scientist, Bobby frequently regaled the junior members of our legal staff with strange metaphors and surprising geopolitical analogies that harkened to the Second City. The allusion that I liked best was offered over a light lunch at Belk's cafeteria one day during the first Gulf War. Someone mentioned Saddam's mistreatment of his various constituencies, and Bobby interjected quite authoritatively that "the lawyers of High Point are the Kurds of the State Bar."

This pronouncement, being indisputable if not entirely self-evident, hung in the air for quite a while before Mr. James was moved to elaborate. "The Kurds," he said (and I'm paraphrasing here), "are a clannish, proud, and fiercely independent people, fated to live in several modern countries they can never hope to control. The lawyers of High Point have those same personal characteristics and a similar lack of political power. They live in the 18th Judicial District, which is dominated by the much-larger Greensboro Bar, and are represented on the Bar Council as a matter of professional courtesy, not as of right. They are always in danger of being dispossessed." Given my vivid recollection of the statement, I must have been pretty impressed at the time. But in the intervening years I seldom had occasion to reflect upon it. I was aware, of course, of the longstanding agreement among the lawyers in Guilford County that allotted one of the district's three seats on the council to High Point, and I had the privilege of working closely with all of the fiercely independent and outspoken people who were elected to fill the "High Point seat" on the council, but I didn't think about the Kurds again until quite recently.

The event that brought Bobby's oracular statement to mind was a mathematical exercise. Every six years we are required by statute to reallocate the 16 at-large seats on the council in accordance with a formula designed to sprinkle them proportionately among those judicial districts having the largest populations of lawyers. Some of you will no doubt recall that I have written on this subject before in some detail. My essay "Proportionality," which appeared in the Summer 2007 issue of the *Journal*, is widely regarded as definitive. Reprints are available. Be that as it may, and six years having elapsed since we last did the math, the formula was applied to the State Bar's current membership data shortly before the council convened in January. The computation evidenced a demographic trend that has been apparent for quite some time. The bars in the 10th and 26th districts (Wake and Mecklenburg Counties, respectively) are

growing much faster than those of any of the other districts, and they are consequently entitled to an ever greater share of the at-large representatives. Since the number of at-large seats is finite, it follows that whenever one of the fast-growing districts gains a seat, some other district with multiple councilors must lose one. The list of prospective "donor districts" is rather small. The 12th (Durham County) has two councilors. The 18th (Guilford) has three. And the 21st (Forsyth County) has two. This year the arithmetic—long division to be precise—indicated that the 10th district is entitled to an additional seat. According to the formula, the district from which it must be taken is the 18th.

OK, that's clear, you can't argue with the numbers, but which of the 18th district's three seats must be relinquished? The statute is silent on that point, but does provide that a councilor whose seat is lost due to reallocation is entitled to finish out the rest of his or her term. As it happens, the term of the councilor from High Point will be the first of the three to expire, at the end of 2011, leaving in place the two newly-elected councilors from Greensboro. Since allowing the High Point seat to be filled anew when the incumbent's term is over would have the effect of allowing "over-representation" to persist longer than is legally prescribed, it seems clear that the seat must be lost when the current term expires.

It's bad luck, really. If we had reapportioned the council last January, rather than this January, the High Point seat would not have been in play at all. Both Greensboro seats were then up for election, and it would have been necessary to select one of them for abolition. It would have been relatively painless, too, since one of those seats was then held by a person who was not eligible to succeed himself, having already served the maximum three consecutive terms, and the other was held by someone who was not seeking reelection. Yes, Greensboro would have lost a seat to Raleigh, and that would have been hard to take, but it would not have entirely lost its presence on the council—like High Point.

Well, is there anything to be done? Two possibilities suggest themselves. One, obviously, is a new treaty between the twin cities. Not wishing to meddle, I can't risk making any specific suggestion, but would note that there is a rather neat coincidence between the number of interested parties (two) and the number of allotted seats on the council (two). The other solution would be somewhat more dramatic—and problematic. The legislature could simply create a new judicial district just for High Point, expanding the total number of districts from 43 to 44. Since every district is entitled to at least one councilor, that would restore the lost representative. And since existing law requires there to be 16 at-large seats, High Point's gain would be no one else's loss. It would be wrong to conclude, however, that such legislative action would have no adverse or unintended consequences. For one thing, the council is already a rather large deliberative body, with 59 elected councilors, three public members, and four officers. Sixty-six people make a pretty big board, and we may be close to a tipping point insofar as efficiency, collegiality, and accommodation are concerned. You know the old saying, "66 is company, 67's a crowd." And, at some point, it will, presumably, be too expensive to add another person to the council.

Legislation to create a new judicial district for High Point would have to be carefully written. As things stand now, judicial districts for State Bar purposes are synonymous and coterminous with prosecutorial districts. Several times over the past few years, the General Assembly has, for various reasons having nothing whatsoever to do with the State Bar, decided to create new prosecutorial districts—generally by splitting old prosecutorial districts. As an unintended consequence of each such decision, a new judicial district was created and the council was necessarily expanded to accommodate the additional councilor to which the new district was entitled. It would certainly be surprising and, perhaps, unfortunate, if by creating a new judicial district to accommodate High Point, there was inadvertently created a new district attorney's office.

Oh well, there's probably a lesson to be learned from all this quasi-legislative legerdemain, but I'm not sure exactly what it is. The whole situation does put me in mind, however, of my own relatively brief experience in private practice before joining the State Bar staff in 1981. I started out in 1978 with a small firm in my hometown of Burlington, which was then, as now, the largest and most sophisticated city in Alamance County. Although there were quite a few lawyers living near the courthouse in Graham, most were located in Burlington. At the time, the single councilor from that district (15A) was from Burlington, as had been his predecessor. Burlington bestrode the legal landscape like a colossus. It didn't occur to me then but, when I look back on the situation, I'm pretty sure that the lawyers of Graham, who were (and are) a very outstanding group of people, were (and maybe still are) the Kurds of the Alamance County Bar. ■

L. Thomas Lunsford II is the executive director of the North Carolina State Bar.

President's Message (cont.)

a big help to new admittees. We hope that other CLE providers in North Carolina will also consider offering this course.

On a parallel track, the Law Practice Management Section of the NCBA recently hosted, to a packed crowd, a free "boot camp" for lawyers entering solo practice. Among the topics covered were law office management, marketing, business development, technology, and fee structure. The LPM Section is planning future "boot camps." In addition, NCBA members who are starting a new law practice can schedule a consultation with Erik Mazzone, Center for Practice Management director, to discuss issues such as business plans, equipment purchases, and office location.

Are CLE courses, boot camps, and consultations adequate to fulfill all the mentoring needs of new lawyers? No, but these programs are strong and positive steps to filling the void and will supplement local programs developed by many district bars throughout the state to assist newly admitted lawyers.

Each of us can also reach out on an individual basis: offering to be a resource for new lawyers, checking on them periodically to see how their practices are going, encouraging them to get involved in bar activities, and, above all, setting an example. Many members of our bar, throughout their careers, have made it a practice to support new lawyers in these and other ways. There are others of us, including me, who can do better. ■

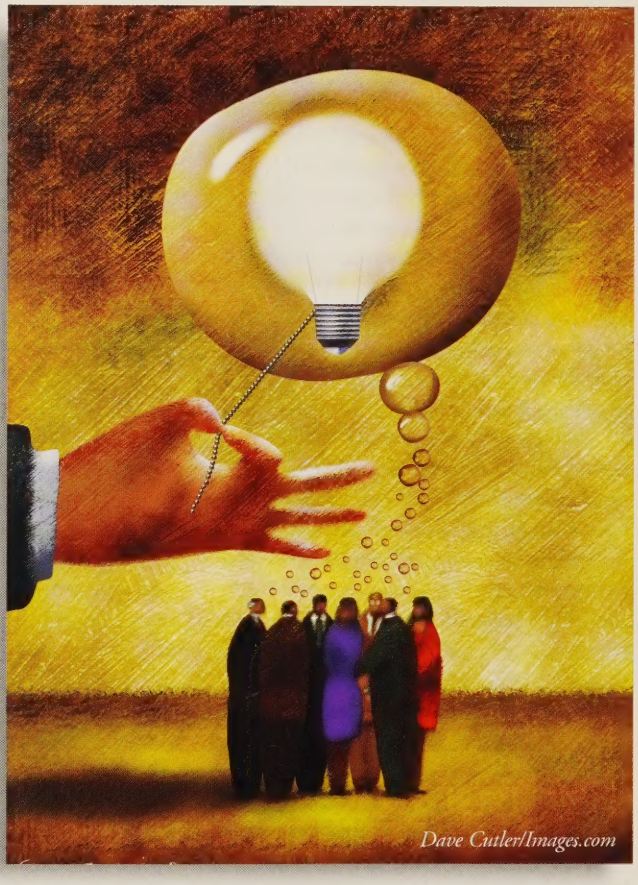
Barbara B. (Bonnie) Weyher is one of the founding partners of Yates, McLamb & Weyher, LLP, in Raleigh.

Diversity Revisited and the Wisdom of Crowds

By The Honorable Allyson K. Duncan

The following remarks were made in October 2009 at the North Carolina State Bar's Annual Meeting.

Thank you for inviting me to participate in your annual meeting, and to witness the swearing in of your impressive new slate of officers. I am delighted to be a part of the installation of Bonnie Weyher as your second woman president. I know firsthand the level of commitment that bar leadership demands, and I am confident that she will handle it with the talent, grace, and humor that she brings to every endeavor.



Bonnie asked me to talk about the importance of diversity in bar leadership. Unfortunately, we judges are notoriously bad at taking directions. It is not that I am going to be completely disobedient: I applaud and support her interest in making the State Bar as broadly representative of the strengths of our profession as possible. But I would like to approach the subject a little differently.

I am declining to strictly follow President Weyher's orders for several reasons. First of all, disobedience comes naturally to me, and it is a proclivity that has only been exacerbated by having life tenure. Second, as one of probably no more than three black female Republican Catholics south of the Mason Dixon line, I feel that I do considerable justice to the subject of diversity simply by showing up. And third, I feel it worthwhile to take a step back and a fresh look.

Diversity is something that we talk about so much that I wonder whether we tend to lose sight of why it matters. Being "diverse" is rather like being "green:" we all know it's good. But there is far less consensus about the difference it makes. I fear that if we view diversity as a social justice goal—one that only benefits minorities and that we can abandon

once we get the numbers right—we are missing the larger point and the stronger argument. Diversity, in my view, is not just something we do; it is integral to the best of what we are. And so I take as the text of my brief remarks this evening the topic, "Diversity Revisited and The Wisdom of Crowds."

You may recognize the title of a book, *The Wisdom of Crowds*, by James Surowiecki. It was the subject of an episode of one of my favorite television programs, "House." It is the current selection of my book club. And its thesis is that the collective judgment of diverse groups is likely to be consistently superior to that of almost all its individual members.

Mr. Surowiecki gives a graphic illustration of this phenomenon:

> At 11:38 AM on January 28, 1986, the space shuttle Challenger lifted off from its launch pad at Cape Canaveral. Seventy-four seconds later, [when] it was ten miles high and rising . . . it blew up. Eight minutes after the explosion, the first story hit the Dow Jones News Wire.
>
> The stock market did not pause to mourn. Within minutes, investors started dumping the stocks of the four major contractors who had participated in the Challenger launch—Rockwell International, which built the shuttle and its main engines; Lockheed, which managed ground support; Martin Marietta, which manufactured the external fuel tank; and Morton Thiokol, which built the solid-fuel booster rocket.

But Thiokol's fell the farthest and the fastest—so much so that a trading halt was called almost immediately. By the end of the day, Thiokol's decline had reached 12%, whereas the others had started to recoup so their total loss averaged only 3%. Almost immediately, then, the market had labeled Thiokol the responsible party. Why?

None of the contemporary press pointed a finger, and subsequent investigation revealed no insider trading patterns that would have provided a clue. It was not until July of that year that the Presidential Commission on the Challenger concluded that the O-ring seals on Thiokol's booster rocket became brittle in cold weather, creating gaps that allowed the gases to leak out. It therefore took the commission six months to realize that Thiokol was the responsible party—something the market "knew" within 30 minutes.

According to Mr. Surowiecki, the market was "smart" that day because it satisfied the four criteria that characterize "wise" crowds:

1. diversity (a broad spectrum of individual views are represented);
2. independence (those views are not affected by the opinions of others);
3. decentralization (individuals can draw on local knowledge); and
4. aggregation (some method exists for turning private judgments into collective action).

The author informs me—and if you know me you know that I must take anything involving mathematics on faith—that the accuracy of group judgment rests on a mathematical truism. If you ask a large enough group of diverse, independent people to make an educated guess and then average the results, the errors each person makes in guessing will cancel each other out. In other words, each guess has two components—information and error. Once you cancel out the error component, only the information remains.

Diversity is important because the best collective decisions are more likely to be a product of the collision of widely disparate viewpoints than the consequence of consensus or compromise. The most intelligent group does not ask its members to modify their positions to come to a point everyone can live with—it does not drift, in other words, down to the lowest common denominator. Instead, as Mr. Surowiecki explains:

> [I]t figures out how to use mechanisms—like stock markets or [bar associations]—to aggregate and produce collective judgments that reflect not what any one person in the group thinks, but rather, in some sense, what they all think. Paradoxically, the best way for a group to be smart is for each person in it to be as diverse and act as independently as possible.

Rather like appellate court panels. Otherwise, why would it take three of us to decide an appeal?

From this perspective, then, diversity is less a social justice goal that benefits the selected few than it is a mechanism for creating a group dynamic that achieves better results. And that group may, or may not, derive its distinctiveness and healthy dissonance just from racial or gender differences. Diversity of background and viewpoint are also critical value adders.

In the small universe that is my chambers, I experience the value of divergent perspectives firsthand. When the new crop of law clerks arrives each fall, the first thing I tell them is that I have zero tolerance for blind deference to my point of view. It may be flattering but is scarcely productive to be surrounded by four people who agree with me. What I need and expect is to have intelligent minds who challenge my assumptions and force me to reckon with my blind spots. I want people whose perspectives expand, not mirror, my own.

And that, for better or worse, (but I suspect for better) is exactly what I have. Two of my clerks are naturalized citizens. One is a young woman from Argentina with a talent for art and an interest in political science. I have my first married couple, seated as far apart as the office will allow, from Harvard. The wife is a young woman from Mexico who dabbled in investment banking. The husband hails from Greenville, South Carolina, has a background in philosophy, and was greeted with intellectual skepticism in the Ivy League because of his southern roots. And the fourth is a young Jewish man from New York with a previous career as a novelist, who has never been south before and whom we (alright, I) tease about being in North Carolina on a visa.

When we get together to discuss issues, our conversations are the audio equivalent of a pinball machine. Even our tangents have tangents. During a recent interview with a young woman who was applying for a clerkship, we got into a spirited debate about an issue in her writing sample. Perhaps afraid to offend, the young woman said almost nothing, escaped with relief, and, I suspect, will be happier somewhere else. But the end result of our collective analyses is, invariably, a product that has been rigorously vetted by opposing views. It is rare for a colleague, for example, to question something we have not at least talked about.

This bears out Mr. Surowieki's thesis—that diverse groups can make stronger decisions than homogenous ones. Homogenous groups tend to become very cohesive very quickly. The more cohesive they become, the more insulated they are from outside views. As a result, as cohesiveness increases, so does the group's tendency to believe that, because they all agree, they must be right. You are familiar with the term "groupthink"—the phenomenon in which discussions among like-minded people lead them to rationalize away any possible counterarguments and reinforce the beliefs they already hold. In a

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Judicial Selection—*The Elon Debate*

By Alan Woodlief, Scott Gaylord, and Andy Haile

On Thursday, October 29, 2009, Elon University School of Law, in conjunction with the Greensboro *News & Record*, hosted a public debate to explore whether North Carolina should maintain its current system of judicial elections or move to an appointive system like that used in the federal system. Jim Exum, former chief justice of the North Carolina Supreme Court, advanced the position that North Carolina should move to a system of appointing judges, arguing that elections wrongly influence judges to consider the political implications of their decisions. Elon law professor and constitutional law scholar Scott Gaylord defended judicial elections, noting that they promote accountability and independence and urging caution in departing from this longstanding process.

Dean George R. Johnson Jr. introducing the event.

The Debate

Exum, Distinguished Jurist in Residence at Elon Law, acknowledged there is no perfect way to select judges, but stated that an appointive system would reduce political influence on judges after they are in office by removing the influence of campaign contributions and popular opinion.

"Politics in judicial selection is like matter in the universe," Exum said. "You cannot destroy it. It will always be there. The question for us is where do we want to put the politics? In my view, the politics is best put at the outset when the judge is selected or appointed, in the appointment process . . . that's tolerable." Exum continued, "But what seems to me to be intolerable is when the judge is in office, working on cases, [and] at that point . . .to subject that judge to popular political recall."

Gaylord countered that elections present a check on the power of judges and a response to the dangers of lifetime appointments. He noted that the adoption of our

elective system in 1868 was motivated at least in part by a desire to provide a check, or external control, to the power of the state's judiciary.

"The election process is a means by which you can try to get the judiciary to have a control, to have a check on the process, and be answerable to the people as opposed to what Lincoln and Jefferson talk about as the 'despotism of an oligarchy,'" Gaylord said. "With lifetime appointments, there's not a lot you could do to put a check on judges within an appointment system, and there's not a lot that the executive or legislative branches could do at that point."

In explaining the necessity of accountability for judges, which popular elections provide, Gaylord quoted James Madison in Federalist 51, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Exum responded that the threat of not being reelected is not necessary to ensure accountability. Rather, the Code of Judicial Conduct and potential sanctions by the Judicial Standards Commission are adequate to prevent individual judges from bringing the judicial system into disrepute.

In supporting an appointive system, Exum further contended that judges should consider only the law in deciding cases, not how their decisions might impact future elections to retain office. He noted that our courts are charged with protecting the rule of law and with ensuring that "the strong do not do what they can merely by virtue of their strength and the weak do not suffer merely by virtue of their weakness."

"Once in office, judges should be insulated from the political winds that blow across our land from time to time," Exum said. "Courts are non-majoritarian. Yet, [our system] takes a position and a person that is doing work that should have nothing to do with what the majority necessarily wants and we subject that person or office to the will of the majority [through popular elections]."

Exum highlighted the recent state Supreme Court decision in *State v. Bowden*, affirming that life sentences were statutorily-defined as 80 years for those individuals convicted during a five year period in the 1970s. Exum said the justices decided the case correctly according to the law, but that the decision could have an impact in elections.

"The decision was legally correct, but politically it is absolute dynamite," Exum said. "If the members of the court were up for election in November, do you think any of them would survive? Probably not. If you want judges to decide cases according to the law, then it seems to me to follow that we don't want judges to be subject to being recalled by a popular vote of the people on the basis of the decision that they made."

Gaylord countered that an appointive system would be just as dangerous to the court's independence and in fact could threaten the co-equal powers among the three branches of government. Such a system could create undue influence by the executive and legislative branches on the judiciary.

"One of the reasons that we moved to judicial elections in 1868 was that concern of political patronage and the judiciary becoming too beholden to the legislative or the executive branch," Gaylord said. "In order for me to get the position as a judge, I have to get cozy with whoever is making the appointments and, if I do that, my objectivity serving as a check on the legislative branch may be compromised."

The Aftermath

Just a few weeks after the debate, an Elon University poll asked North Carolinians their opinion of our state's judicial selection process. The contrasting positions of the Elon debaters each found some measure of support in the poll's results.

The results make clear that residents do not believe that political considerations should have any bearing on a judge's court decisions. When asked whether they agreed with the following statement—"judges should be concerned about the law, not about getting elected"—65.8% of those polled strongly agreed, and 30.1% agreed with the statement. An appointive system by an independent commission, rather than by the governor or the General Assembly, also found support in the poll, with nearly half of respondents (49%) agreeing with that means of selection.

Still, residents appear skeptical that politics can be removed from the judicial selection process, even in an appointive system. Evidencing this skepticism, three in four residents polled disagreed with the statement that appointing judges is better than electing them. Similarly, 69% of respondents expressed support for continuing popular election of judges.

Reconciling these poll results, it appears that North Carolina residents are open to an appointive process, but only when they can be assured that politics will be removed from the process as much as possible. If politics cannot be removed from the process, then the state's residents appear to favor the devil they know, content to retain the power of their vote and risk the potential evils of politics in the popular election process, rather than sacrifice their vote and risk the evils of politics in a system where the governor or legislature makes the appointments.

Given the state's urgent budget concerns, it is unlikely that the General Assembly will take up changes to the current system of selecting judges in the near future. However, some have proposed that an appointive system would involve significantly less expense than popular elections and would aid efforts to balance the state's budget.

Undoubtedly, this issue will continue to garner attention, and thoughtful minds will continue to differ on the subject. Debates like the one at Elon serve to keep this important issue in the public consciousness, to educate the public about the benefits and pitfalls of elective and appointive systems, and to foster continued thought and discussion about the ideal system for selecting judges in North Carolina. ■

The following three articles appeared in the Greensboro News & Record *(debate sponsor) prior to the debate and are reprinted with permission.*

Debate Over Reforming the System Keeps Going

By Alan Woodlief

The United States Supreme Court's recent decision in *Caperton v. Massey Coal Co.* has focused attention on a longstanding debate—whether state judges should be elected or selected through alternative methods such as merit and appointive retention

systems. *Caperton* highlighted one of the most oft-cited concerns with judicial elections, the potential influence of campaign contributions on judicial independence. The *Caperton* situation was extreme—the $3 million contribution from the CEO of a mining company to a candidate running for the West Virginia Supreme Court where the company's appeal of a $50 million punitive damage award was pending is the stuff of popular legal fiction, and in fact, John Grisham has said that he had *Caperton* in mind when he wrote his 2008 novel, *The Appeal.* While such an extreme example does not necessarily dictate that we dispense with our long history of electing judges, it does again caution us to the potential pitfalls of this system and calls us to carefully consider potential alternatives or ways to ensure the effectiveness and integrity of the current system.

Concerns regarding judicial independence are not new with the *Caperton* decision. Author Timothy S. Huebner in his book, *The Southern Judicial Tradition,* explains that Thomas Ruffin, a storied chief justice of the North Carolina Supreme Court in the 1800s, decried the election of judges as an assault on the judiciary's independence and feared that elections would lead to "dependent, and by consequence, flexible, cringing, time-serving, weak, bad men for judges." Prior to 1868, North Carolina's judges were selected by the General Assembly and served during good behavior, which could conceivably translate to a life appointment. Ruffin was concerned that North Carolina would depart from this system and implement judicial elections. In fact, that was the case, as the North Carolina Constitution of 1868 ushered in the election of our state's judges, a system that has been in place now for 142 years.

The idea of some form of a merit or appointment system did not lie dormant from 1868 to the present. The American Judicature Society, an organization which studies courts and the judiciary with the aim of improving the administration of justice, indicates that in 1974, the North Carolina General Assembly considered a merit selection bill which passed two readings on the House floor before failing on the third reading. In 1977, a similar bill failed on the House floor, despite having the endorsement of the chief justice and the North Carolina Bar Association. At the suggestion of Chief Justice James G. Exum Jr., and others, in 1987, the General Assembly established a judicial selection study commission, and this commission recommended that Supreme Court justices be appointed. On at least four other occasions, in 1989, 1991, 1995, and 1999, the Senate approved bills calling for some combination of merit selection, gubernatorial appointment, legislative confirmation, and retention elections, only to have them be defeated or die in the House. The North Carolina Bar Association has long supported merit selection of judges and has advocated an appointive retention method of selection.

Our state has taken steps to combat the concerns of bias and loss of judicial independence highlighted in *Caperton.* In 2002, the General Assembly adopted the Judicial Campaign Reform Act, establishing non-partisan elections for the appellate courts (later the trial court elections were made non-partisan), limiting the amount of campaign contributions, and offering candidates who adhere to strict fundraising and spending limits the option of using public financing during their campaigns. In so doing, North Carolina became the first state to adopt full public financing of appellate judicial elections and subsequently has been held up as a national model in this regard. In an opinion piece just last spring, *USA Today* praised our publicly financed judicial elections stating that they are, "proving their worth."

Still, concerns remain with the popular election of judges, including the perceived inability, or perhaps unwillingness, of voters to discern the qualifications and effectiveness of judicial candidates. An article in the *News & Record* from October 1, 2008, recognized that judicial elections often puzzle voters, as candidates are prohibited by the code of judicial conduct from stating how they would rule on specific legal issues. Many surveys of voters reveal that they feel ill-prepared to vote for judges.

To remedy this ill, significant effort has also been devoted to educating the state's voters about the candidates for judicial office. Several organizations, including Greensboro's own Court Watch, have made great strides in educating voters with judicial report cards and surveys measuring judges' effectiveness. Many North Carolina newspapers, including the *News & Record,* continue their tradition of editorial endorsements, and the State Board of Elections publishes a Voter Guide. The Bar Association has also embarked on a judicial performance evaluation program, with its first survey being conducted this summer and results released in early 2010. Voters who wish to be informed about judges' effectiveness and fairness can be now.

Because of the public financing and voter education efforts mentioned, our state thankfully does not face a crisis of confidence in our judiciary like that in West Virginia after *Caperton.* However, there is still room for improvement in the system. Given the General Assembly's forward-thinking approach to judicial campaign reform earlier this decade, we can be optimistic that it will continue to strive to enhance the judicial selection process, perhaps by adopting some form of merit or appointive retention system. ■

Alan Woodlief is associate professor and associate dean for admissions and administration at Elon University School of Law.

Justice Exum debating.

Selection: The Way to Ensure That the Best-Qualified Are On the Bench

By Andy Haile

How many of these names do you recognize: Linda McGee, Wanda Bryant, Rick Elmore, Martha Geer, Donna Stroud? Unless you practice law in North Carolina, chances are that you don't recognize any of them. But these are important people. They are the members of the North Carolina Court of Appeals, our state's second highest court. The court of appeals makes decisions that affect individuals and businesses every day. Other than attorneys who litigate for a living, however, very few people know much about its members. Do you know their judicial philosophies, their "judicial temperaments," or how they treat the litigants and attorneys who appear before them? Can you name any other members of the court of appeals? Of the North Carolina Supreme Court? And yet, despite the general lack of knowledge about our courts, North Carolina voters go to the polls year after year to elect who will sit on the bench and decide issues of major importance, including even matters of life and death.

A lack of knowledge about the candidates is just one reason why judicial elections are a bad idea. Potentially more harmful is the role that money plays when judges are elected. Campaigns require money. North Carolina has adopted a public financing system that seeks to reduce judicial candidates' dependence on campaign contributions. That's a positive change, because most contributions have traditionally come from attorneys, the very people who will appear in court before the judge.

But North Carolina's public financing system is far from perfect. First, it only applies to the election of appellate judges, not trial court judges. In addition, to qualify for the public financing system, judicial candidates first must raise approximately $40,000. Therefore, even if candidates opt into the public financing system, fundraising still plays a part in the election process. Moreover, participation in the public financing system is voluntary, and the amount of funds available to candidates opting into the system is limited. Candidates running for the court of appeals receive a maximum of $480,000; those running for Supreme Court max out at $700,000. Those limits mean that candidates choosing not to participate in the public financing system could significantly outspend opponents who are receiving public financing.

In some states, judicial races have turned into high-dollar contests. Candidates in an Illinois Supreme Court race in 2004 spent a combined $9 million on the election, most of which came from campaign contributions. From 2000 to 2006, spending by candidates and political committees for a seat on the Georgia Supreme Court rose from approximately $40,000 to $4 million. Those spending levels would dwarf the funds available through the public financing system. Recent judicial elections in North Carolina have not been multi-million dollar affairs, but they soon could be, especially with our Supreme Court so closely divided (despite ostensibly non-partisan elections, it's widely known that four members of the current Court are Republicans; three are

Democrats). If the amount of spending in other states' judicial races spreads to North Carolina, candidates who want to stay competitive will have no choice but to opt out of the public financing system.

So what's the problem with having to raise money to run for a judicial position? The infusion of money into the selection process raises concerns over judges' ability to act impartially. Would you like to know that your opponent in court or his attorney had contributed money to the judge's election campaign, while you hadn't? Would that affect your faith in the judge's ability to fairly and impartially hear your case? For most people it would. Money has no legitimate place in selecting judges. Judges are not meant to be politicians who reflect the current political mood. Instead, they should be impartial arbiters of justice, willing to make politically unpopular decisions when the law requires. Campaign contributions cast doubt on judges' ability to do that. Justice O'Connor had it right when she recently quipped, "Justice is a special commodity. The more you pay for it, the less it's worth."

In addition to the serious concerns over money's role in judicial elections, elections may not result in the selection of the most qualified judges. Many well-qualified individuals refuse to run for election because they have no desire to become quasi-politicians, traveling around the state asking for money to fund their campaigns. Conversely, elections may result in voters choosing judges based on dubious criteria. Empirical evidence indicates that when confronted with a lack of information about candidates, voters tend either not to vote or to vote for candidates of their own gender. As a result, women are more likely to be elected as judges than men, since there are more female voters. In addition, many candidates believe that the position of their names on the ballot impacts their likelihood of success (they believe that those placed first have an advantage over candidates farther down the ballot). These are hardly ideal ways to choose who will make decisions broadly and significantly impacting our state and its citizens.

Elections are a flawed way to choose judges, but there are alternatives. Federal judges are appointed for life. Several other states have enacted merit appointment processes with shorter tenures. During the most recent legislative session, the North Carolina General Assembly considered a bill sponsored by Guilford County Representative John Blust that provided for the appointment of appellate judges after a rigorous merit selection process. Voters would still have a voice in the judicial selection process by having the opportunity to retain or remove a judge after a relatively short "trial period" on the bench. If the voters elected to retain the judge, the judge would then serve an eight-year term on the bench.

While this proposed legislation was less than perfect (it did not change the election of trial judges), at least it constituted a move in the right direction to get qualified, independent judges on the appellate bench. Justice requires that our best and brightest citizens are selected to serve as judges. The current system of electing judges fails to accomplish that goal. ■

Andy Haile is an assistant professor at Elon University School of Law and a practicing attorney in Greensboro.

Election: Changing Current System Shouldn't Become a Rush to Judgment

By Scott Gaylord

Although Alexander Hamilton thought that the judiciary was "the least dangerous branch" because it had "no influence over either the sword or the purse," federal and state courts have assumed an ever-increasing role in our federalist system. State courts now handle roughly 98% of the cases nationwide, covering issues that touch on all facets of their citizens' lives. As a result, the selection of state court judges is of critical importance to our system of government. For the judiciary to provide the requisite check on the legislative and executive branches of government, the selection process must ensure that our judges are independent, accountable, and well-qualified.

Since the adoption of our post-Civil War Constitution in 1868, North Carolina has elected the members of its judiciary. The United States Supreme Court's recent decision in *Caperton v. Massey Coal Co.,* though, has focused national attention on the potential threat to judicial independence created by large, independent campaign expenditures. But the concern over the effect of elections on judicial independence is not new in North Carolina. The North Carolina Bar Association repeatedly has advocated a merit-based appointment system, and the North Carolina House of Representatives passed a bill this past spring proposing retention elections. And these efforts are likely to gain support in light of *Caperton.*

Although shifting to a merit-based system of judicial selection ultimately may improve North Carolina's judiciary, there are several reasons to proceed with caution before revamping a provision in the North Carolina Constitution that has served our citizens for more than 140 years. First, history informs us that campaign contributions are not the only threat to judicial independence. The current system was not simply an unprincipled expression of Jacksonian democracy. Rather, the shift to judicial elections in North Carolina and other states originally was intended, as one commentator has noted, to increase judicial independence by freeing the judiciary from "the corrosive effects of politics and … to restrain legislative power." For our systems of checks and balances to work properly, the judiciary must be independent of the other coordinate branches of government. That is, a judge must not, as the old adage states, simply be a lawyer with a politician for a friend.

Moreover, political influence resulting from gubernatorial appointments or committee nominations may be more difficult to scrutinize than campaign expenditures. Each state has rules of judicial conduct that require judges to recuse themselves under certain circumstances. Disclosure requirements make it relatively easy to track individual expenditures to determine when recusal might be necessary. And *Caperton* now requires courts to monitor expenditures to ensure that due process is not violated. In a merit-based system, citizens will have to defer to the integrity of the selection committee and the judicial appointee, even though critics of the current system are unwilling to grant such deference to an elected judge.

Second, those championing long-term appointments of judges tend to downplay the importance of accountability. As Chief Justice Roberts has noted, "[w]hen the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It

is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities."Under our current system, if one of our judges fails to fulfill her judicial function, the voters can vote that person out and elect someone who better reflects their judicial philosophy. When a judge is appointed for a long tenure, no such check is available, a flaw that retention elections are meant to alleviate.

But retention elections pose a similar threat to judicial independence as periodic elections. Under several current proposals, a committee would review a judge's performance and issue a recommendation on whether to retain the particular judge. The committee's recommendation regarding retention is likely to be one of the few details that voters know about the incumbent. The "probability of bias" therefore remains. To garner committee support, a judge may feel pressure to rule in ways that either benefit committee members directly or evince a judicial view with which the committee agrees. Moreover, if the committee does not favor retention, the incumbent will need to raise considerable money to respond to the unfavorable recommendation, which would inject the threat of large campaign expenditures back into the process.

Finally, advocates of an appointment-based system frequently contend that merit-based selection is necessary to encourage "the selection and retention of the most qualified persons to serve as judges." The campaign process may discourage some well-qualified candidates who do not want to be thrust into the limelight or to impose on friends and strangers for campaign contributions. But a far higher barrier already may exist—the financial compensation that North Carolina judges currently receive. Judicial salaries in North Carolina are among the lowest in the nation and are significantly lower than in the private sector. By increasing judicial compensation, North Carolina may encourage more well-qualified candidates from the public and private sectors to seek judicial election without having to alter the current system.

Professor Gaylord responding during the Q&A.

Because the judiciary plays a critical role in our political system, it is important that the judicial selection process yields well-qualified, independent judges who are accountable for their decisions. Improvements to the current system should be welcomed but only after they have been fully considered. Given that a move to a merit-based system will require an amendment to the North Carolina Constitution, voters should be cautious to make sure that the problems with campaign expenditures are not replaced by the problems that may flow from political patronage. ■

Scott Gaylord is an associate professor at Elon University School of Law.

Diversity Revisited (cont.)

groupthink setting, deliberations have the counterproductive effect of closing people's minds rather than opening them. As a result, while homogenous groups are great at doing what they already do well, they become progressively worse at identifying new alternatives and solutions.

Why does that matter? If you view diversity primarily as a social good, then it may seem to be a luxury we can ill afford during challenging economic times. If you believe in "the wisdom of crowds," however, perhaps the reverse is true. I am told that of the 1,000 candidates who took the last bar exam, approximately 800 were licensed and fewer than half have jobs. Perhaps, in this environment, "groupthink" is the luxury we can ill afford.

It cannot be an accident that one of the most defining characteristics of our judicial system is premised on the assumption of collective wisdom. Our jury system is designed to take a truly random group of people and ask them to make the most important decisions we face as a society. And they do. I am consistently impressed by the ability of juries to parse through some of the most complex and puzzling facts imaginable, with instructions from judges that are sometimes less than a model of clarity, and make decisions in accordance with the law.

There is a quote, often attributed to Anais Nin but paraphrased by me, that succinctly expresses my point: "We see the world not as it is, but as we are." The more diverse a group of decision-makers is—whether within an appellate panel, a bar association committee, or a jury—the more ways of seeing the world that will be represented. And from the diversity of that representation, in the crucible of that difference, better decisions will emerge. ■

Judge Duncan was a partner in the Raleigh offices of Kilpatrick Stockton, LLP, served on the North Carolina Court of Appeals from 1990-1991, and was an assistant professor of law at North Carolina Central University. On August 15, 2003, Judge Duncan was sworn in to a seat on the United States Court of Appeals for the Fourth Circuit.

Legal Hiring in Today's Economy: The Class of 2009 Enters the North Carolina Job Market

By Maria J. Mangano

When asked whether he is surprised by the fact that more than six months after receiving his law school diploma he is still seeking a permanent job, Jack Rockers quips, "Do you mean my expectations going into law school or my amended expectations?" In terms of those amended expectations, amended above all else by the national economic downturn, Rockers says it's no surprise at all. "Amended expectations" seems to be the theme for the 2009 graduating class in law schools nationwide, including those seeking legal employment in North Carolina. To give you a sense of what it is like out in the trenches for new graduates, this article will look at some trends and profile some members of the newly graduated Class of 2009 at the University of North Carolina School of Law.

For starters, the big firm scene in the Tar Heel state has been significantly affected. Like all law school career services offices, the University of North Carolina tracks employment information on its students and recent graduates. For the Class of 2009, our color-coded spreadsheet sports a new color: red, to indicate a newly hired associate whose start date has been deferred. This unprecedented phenomenon of big firms deferring traditional fall start dates for first-year associates began to surface with the Class of 2008, when a few graduates were requested to start later than expected. By the following year, the economic crisis had hit full force and the trickle of deferrals had become a flood, with the majority of big firm hires for the Class of 2009 being informed that they would not start until the following January, or September, or even as late as January 2011, over a year and a half after receiving their JDs.

This phenomenon is a nationwide one. In North Carolina, most of the state's largest firms have delayed the traditional fall start date of at least some of their associates. In addition, since this is such a new development, firms are approaching their deferral programs in diverse ways. A number of firms have provided their new hires with a monetary stipend during the deferral period, some with no strings attached, and others requiring the newly-fledged attorneys to find work in the public sector in exchange for the stipend.

Requiring public sector work in exchange for a stipend has created another phenomenon heretofore unseen: a cadre of young attorneys offering to work for free in cash-strapped nonprofits and the budget-slashed and -frozen halls of North Carolina state government. Ron Charlot was slated to head to the bright lights of New York City and work for the megafirm of Ropes & Gray. A deferral meant a change in travel plans; instead of the Big Apple, he's spending a year in Raleigh at Disability Rights North Carolina (DRNC), a nonprofit specializing in advocacy for the disabled. His supervisor, Litigation Director John Rittelmeyer, says his organization is "fortunate to have him with us for the coming year," noting that "Ron increases our capacity to reach more clients; vulnerable individuals whose lives have been drastically affected by the same economic tides that brought Ron to work with DRNC." Ron, in turn, is not only enjoying working in an area of law he had not expected to, he is developing "skills as a lawyer while doing something helpful in the public sector." He sums it up thus: "I've gotten an opportunity and it's working out well for me. I'm making the most of it."

The University Counsel's office at UNC-Chapel Hill has also benefited from the deferred associates phenomenon. Previously, the counsel's office hired a new law school graduate as a one-year fellow in higher education, paying for this position out of their budget. One of the many tough decisions the office made in 2009 following state budget cuts was to eliminate that position. But the final picture for 2009-2010 was a rosy one: instead of a single fellow paid from their budget, they were able to bring on four deferred associates for periods ranging from four to 12 months.

Associate University Counsel Joanna Carey Cleveland is extremely pleased with the arrangement: "We have had a great experience with these smart, talented new lawyers who are working with us at no cost to the university. Their work ethic and work product have been consistently impressive, and they have had opportunities to work with our lawyers on a wide range of issues. Once their deferrals end, they will return to their firms with increased legal knowledge and practical skills gained from working at a complex organization. This opportunity is clearly a win-win for all."

So pleased is Cleveland with deferred associates that she says she'd love to have more on board next year, which naturally raises the question of whether firms will continue to defer associates (and pay them stipends) in the future. Although some members of the Class of 2010 have already had their start dates deferred, it is still unclear whether that class will experience deferrals in as great numbers as the preceding one. However, anyone's best guess is that there will be a decline in the number of deferred associates, as larger firms better tailor their hiring to current economic realities.

With deferred big firm associates taking positions in the public sector, another issue has arisen for students who had planned and prepared during law school to take public interest jobs—that is, whether they are being squeezed out of these jobs. Once again, it is

difficult to say for sure, although overall the situation does not seem to be as dire for public interest graduates as feared. Some deferred associate positions (as in the case of the University Counsel) are simply extra positions created by busy employers who would otherwise be unable to afford them and who are delighted to have more hands on deck. And there is definitely evidence of regular entry-level hiring in the public sector, not as abundantly as in the recent past, but permanent entry-level jobs nonetheless. Here at UNC, we have already seen members of the Class of 2009 employed by North Carolina Prisoner Legal Services, by the North Carolina General Assembly, and as assistant district attorneys and public defenders across the state.

Kelley Gondring is one of those newly hired public interest lawyers. Gondring is a native of Winston-Salem who got her juris doctor from Chapel Hill in May. Her original plan was to specialize in the policy side of public interest law ("trial work scared me") and also expand her horizons and relocate outside of North Carolina—in fact, she worked in Colorado both summers during law school. When she was unsuccessful in securing permanent employment out west, she decided to sit for the North Carolina bar exam. In October, not long after being licensed, she accepted a position in her hometown as an assistant public defender, a job she believes was "not posted anywhere" but that she learned about through diligent networking.

Her long job search—"I've been looking for a job since the day I walked into law school my third year"—had some silver linings, one of which was that the more she explored policy-related jobs, the more she realized it wasn't what she wanted to do in ten years. As to her decision to work in the once-feared courtroom, Gondring says, "The economy pushed me to challenge myself." She reflects that going home again has been a positive influence in her work, allowing her to build an "easy rapport" with her clients: "I know the community. I know the high schools. I grew up with some of the court personnel."

Like Gondring, Jack Rockers came to law school in order to work in the public sector, with a goal of practicing immigration law. All his legal training and activities were directed towards this goal. However, the sluggish job market, plus a desire to remain in the Triangle, where his wife is employed, motivated him to broaden his goals to working with low-income populations generally and using his Spanish. Even so, seven months after graduating with honors he had still not found permanent employment, instead piecing together four different jobs: a volunteer position with the Southern Coalition for Social Justice (SCSJ), and three paid positions—contract work for the Center of Death Penalty Litigation, representing indigent clients through Indigent Defense Services as a court-appointed lawyer, and working as a painter and landscaper. ("It's not so bad. I get to be outdoors.")

Despite the fact he has not yet landed an entry-level job, Rockers remains optimistic. He says the public sector market is "not a wasteland" and that he has a number of promising leads. The SCSJ likes his work so much that they have said they would hire him—if only they had the funds. In addition, being on the appointed list has expanded his horizons, as he has found he enjoys the thinking on your feet required in the courtroom, and that this experience has "kindled an interest" in public defense work.

Jason Miller is another member of the UNC Class of 2009 who had to amend his expectations in the current economic climate. Once Miller learned of his deferred start date—he is currently slated to start work at Parker Poe in September 2010, a year later than originally anticipated—he quickly put together a plan that is bringing him both income and experience. Miller has an entrepreneurial spirit and a business background that includes an executive position with a large national animal-related nonprofit, and decided to hang a general practice shingle in Raleigh. A few months later, he has already handled "business disputes, bankruptcy, family law, personal injury, contracts, housing, traffic, and minor criminal matters." He also is working part time on the civil team at North Carolina Prisoner Legal Services. It's all working out better than expected. According to Miller, "Maybe I've been lucky so far, but I've had more than enough work."

Not everyone with a big firm offer has been deferred. Certain practice areas have been less affected by the downturn, and consequently, graduates with offers in these areas have tended to keep their traditional fall start dates. Mia Lindquist came to North Carolina with the intent of relocating from her home state of Pennsylvania. She concentrated her job search on Charlotte, where she has some family connections, and focused on litigation. She accepted an offer with the Charlotte office of Hedrick Gardner during her third year and started work in September 2009. Compared to some of her classmates, she acknowledges that she is fortunate to have come through "unscathed," in part because her firm concentrates on civil defense, an area not especially vulnerable to current economic changes.

Matt Ballew always wanted to be in private practice, but unlike Lindquist, his dream job was in a small firm. Despite strong grades and excellent summer experience, he knew that the fact he wanted to stay in the Triangle, a popular if not saturated market for new law graduates, only made his search more difficult. The fact he borrowed heavily to attend law school didn't make the search any less nerve-wracking. But he persevered, making the decision to "stop scouring online job postings, stop the cover letter/resume routine, and simply trust in the value of networking."

Ballew's strategy paid off. In August, he started working for Wade Barber, who has been practicing in Chatham and Orange Counties since 1971. Being a general practice small town lawyer suits Ballew to a tee: "In three months of practice, I feel like I've experienced more than most get in their first three years. I am in criminal district court at least once a week. I meet with folks almost daily, and help them with everything from getting their wills and estates in order, to resolving a boundary line dispute with a neighbor." Like his classmates Jason Miller and Mia Lindquist, Ballew does not take his situation for granted: "Each day I try to take a moment and remind myself how lucky I am to be in this position."

The tight job market is tougher on some people than others. As Matt Ballew discovered, looking in a popular market is a factor. One Triangle job hunter working on a six-month research project told me that when the Orange County Public Defender's Office posted a job, "Everyone was talking about it, or knew people who had applied." Law school career services offices are familiar with this situation—an employer in Raleigh or Charlotte who posts an opening gets inundated with resumes, while employers in rural areas find their mailboxes empty.

Another group of seekers facing special challenges are those new graduates who are simply not sure what they want to do with their law degrees. As one member of the

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Filling a Void—Why We Started a Mental Health Court

By Judge Joe Buckner

When I began my service as a judge for Orange and Chatham Counties 15 years ago, I knew little about severe and persistent mental illness.

It became quickly apparent, especially in our seat of court in Chapel Hill, that a significant number of mentally ill offenders were cycling in and out of our criminal courts continually.

Why the concentration in Chapel Hill versus Hillsborough, Siler City, or Pittsboro? We had theories. Our town has the state's largest public hospital. The university campus is open to all. The town and the Inter Faith Council sponsors a well-run homeless shelter. Two interstates and two major state highways run through our county.

Regardless of the cause, what I saw in those first few years was that many offenders were rearrested less than a day after release from jail. In 1994, only three district judges served our five seats of court, and we had minimal jail capacity in both counties.

Judges were likely to preside over the same sessions each week. Often a complainant in cases involving the mentally ill was a fatigued family member or an upset neighbor, or frustrated merchant who came to court to ask that I order the offender to "get help," "not drink alcohol," "take their medicine," or leave the complainant alone.

Jail administrators often sought early disposal of the cases involving mentally ill defendants or at least an unsecured bond because these offenders did not mix well with the usual jail population.

Traditional Court and Law Enforcement were Overburdened

When Structured Sentencing began in North Carolina in 1995, sentencing for most misdemeanors was in effect decriminalized. An offender with 1,000 prior 2nd degree trespass convictions faces a maximum penalty of 20 days.

The police officers I knew from work as a criminal defense attorney in my private practice shared their frustration about the many community nuisance and family disturbance offenders. The conflicts resulted in frequent calls to police and many trips to UNC hospitals for involuntary commitments. After that time and effort, law enforcement still faced new calls for the same offenders and disturbances days or weeks later.

Law enforcement supervisors have taught me that officers are a finite supply. They address all kinds of critical public

safety needs in cases involving family violence, drunken driving, community patrols to prevent assaults, robberies, and break-ins, and more.

When two or more officers were responding to a call involving a SPMI (Severe and Persistent Mental Illness) offender for several hours and multiple times a month, other community priorities went unmet.

Added to that were the other responsibilities held by the district court—family law, family violence, abuse and neglect of children, juvenile delinquency, motor vehicle (from DWIs to death by motor vehicle), general civil bench and jury, hospital commitment hearings, felony pleas, probable cause hearings, first appearances, etc.—resulting in a system that is easily paralyzed.

As judges, we needed to give appropriate attention to the duties we are statutorily and constitutionally mandated to do. But we were being overwhelmed almost daily.

Handling a chronic offender who was not going to jail for a long period because of limited jail space and legislatively mandated short sentences, and whom the state mental hospitals were often discharging shortly after commitment, required a new approach. We had a vivid picture of the problem, and needed a plan to solve it.

Finding a Better Way

About ten years ago, one of my law professors from UNC, Dan Pollitt, and Bill Meade from the National Alliance for the Mentally Ill (NAMI) and I sat down to lunch.

What we discussed was a groundbreaking effort that a Florida state court had made in handling offenders with SPMI. Florida already had been the pioneer in the nation's first drug court, and this effort was born out of the same philosophy. It showed promise.

They used the court to achieve therapeutic compliance so that the defendants will not reoffend and will get the help they need. I later learned from several Florida judges that as other states depopulated their patients from traditional state hospital systems, Florida, with its warm weather, got a double-dose of this population.

One of the judges summarized the routine: municipalities in the Miami-Dade area responded to an increase in homeless people with SPMI by making it illegal to push a grocery cart down the street. An offender is arrested for doing just that, and can't make bond. The offender waits in jail with very little medication management. Public defender tries to interview her client, and realizes that client is showing signs of mental illness. She seeks a court order for a competency evaluation. The offender is transferred to a state hospital for evaluation within in a few days. Then the offender is transferred to a local jail awaiting the mental health professional's evaluation.

When the report arrives showing that the inmate is not competent to aid in his own defense, the public defender presents the report to the judge and the assistant district attorney agrees that the offender is not competent to stand trial. The assistant DA, happy to not have to try a pushing-grocery-cart-down-the-street case, announces the dismissal. Defendant is released from the jail, and the cycle begins again.

The process averaged three weeks from arrest to release. The jail reported that its inmates' emergency stabilization budget was seven times higher than the general jail population and the secure stay was eight times longer for an offender with a similar status crime.

Three days later the offender was arrested for pushing a grocery cart down the street, or speaking to a clock in a restaurant, or telling his mother he is Jesus and that he is going to break all the windows in the house to allow the angels inside.

Sadly, the criminal justice professionals had to treat these offenders differently than others in the jail population because of the threats of harm to self and others. Many were housed naked because of suicide attempts with their own clothes. Some were sprayed with hoses to wash body emissions off of them because the jailer, not professionally trained in helping psychotic patients, knew no other way to safely approach them.

Our Solution

On hope and a hunch we launched our Community Resource Court (CRC) in 2000. It works by getting all the participants in criminal court to agree on a treatment and an outcome, and seeing that it is followed.

Here is an example. A 25-year-old man visits a local bar. He has been asked to leave because he has been pestering other patrons about his ability to communicate telepathically to the Pope.

Police forcibly remove him from the bar. He's charged with communicating threats, being intoxicated and disruptive, second-degree trespass and resist, and delay and obstruct of an officer in the discharge of his duties.

Unable to make bond, he is interviewed by pre-trail services or manifests an affect to jailer, assistant district attorney, his attorney, judge, or other court officer which alerts them to possible mental illness. Often a family member also alerts the public defender or district attorney that the defendant is a prior user of mental health services.

What used to happen is that the case moved on, and everyone did the best they could to move his case through the criminal justice system.

Under our Community Resource Court model, the lawyer or other court official recommends referral for case managers to screen him before court. His history is collected from family members and treatment professionals. The family reports that he has skipped taking his medicine or has begun drinking with his meds (which can result in significant impairment or damage with most psychotropic medicines).

On his court date, the offender is addressed by the judge, who explains in open court the broad parameters of CRC and why he is there. He's given time to meet with the case manager and lawyer simultaneously and ask questions about his therapeutic and court compliance requirements.

The initial treatment is based on his individual case management plan. He might be required to attend therapy, abstain from alcohol and non-prescribed drugs, attend group meetings, stay away from certain establishments or people, or attend vocational rehabilitation, AA or NA, for example.

The prosecutor and defense attorney work out a legal outcome based upon compliance. This could be a deferred prosecution with dismissal, a prayer for judgment continued granted, or even not having a jail sentence activated.

The court awards certificates of accomplishment from the judge. The district attorney, defense attorney, case managers, probation, and others praise the progress of

the participant. Often the offender gets applause from everyone in court for goals achieved.

The referring attorneys are not required but are welcome to attend the monthly session. One assistant public defender and one or two other designated attorneys manage all the participants. The referring attorneys get the case back in regular court if the client fails or a due process issue arises. The referring attorney and charging civilian complainant and/or officer is encouraged to attend the graduation to celebrate their client's success.

The CRC is entirely voluntary for the defendant, though there is no right of acceptance. Participants are screened for suitability and are admitted under a signed agreement. The district attorney, community corrections, or case management may opt the defendant out for public safety concerns. The participants can choose not to participate at any time and return to regular court.

Our district attorney, public defender, other interested defense attorneys, community corrections (probation/parole officer), the Chapel Hill Police Department, the Orange County Sheriff's Department and Pre-Trial Services made a commitment to work a once-a-month court session in Chapel Hill.

For most of the court officials and law enforcement, the work is the same but managed a different way. What we have found is that it is often easier for the assistant district attorneys because they are not handling the case during one of our typical busy criminal court sessions.

The defense attorneys are typically satisfied with the outcome because their clients are not in jail, are not being rearrested on new charges, and are achieving some stability and peace in their lives.

The victims are usually more satisfied because the person has ceased, or at least slowed, the occurrence of his abhorrent behavior.

The sheriff's department is happier because this defendant is not disrupting the general population in the jail or repeatedly taxing the limited jail capacity. Our model is saving local jail bed space and the medical expenses typically charged to our county by slowing or ceasing recidivism and reducing emergency hospitalization.

The judges are more satisfied because we are "not paying for the same real estate twice" and can more easily get to all the other matters for which they are responsible.

The police are receiving fewer calls, making fewer arrests, and risking less injury to officers attempting to subdue a combative, delusional offender.

The Community Resource Court Team

In addition to courtroom attorneys and law enforcement, other necessary partners are our area Local Management Entity (LME) Orange-Person-Chatham, which provides case managers and referrals to treatment providers. Initially we had help from Congressman David Price, who secured a grant to fund the case management position, and later from state Rep. Verla Insko who sponsored a bill to provide state funds to support the case managers. The Department of Health and Human Services granted a waiver to our LME to allow these positions to be exempt from traditional billing requirements. Without this cooperation and assistance, CRC would not exist.

The critical key for therapeutic success has two components: case management and access to treatment. Without early case management—essentially a person who is responsible for ensuring the offender follows a treatment plan—the participant would not be effectively engaged in treatment and other necessary services.

The other element, access to treatment, means that medical and mental health treatment is accessible and attainable. In addition, shelter, food, and other necessities of life must be available. Again, case managers, aware and knowledgeable of the available government, charitable, and nonprofit resources are a must to the success of the participant.

A significant impediment to medicine intake is homelessness. People living beside garbage bins and under bridges are not particularly motivated to take their medicine. With these two elements, our treatment providers are finding that the patient is showing therapeutic compliance, making therapy appointments, taking medications as directed, and attending peer support groups when prescribed.

Finally, the offender is happier because they are not in jail and are on their medications, which allows them to access other necessities like housing, food, hygiene, and other often basic opportunities like vocational rehabilitation and even jobs.

What we did not see at the outset of this effort was the sense of achievement many offenders have when they meet thresholds or graduate from the program. They have a great sense of pride in the work they did and the success of beating the illness or holding it at bay.

When asked what she wanted when she was living on the street with an untreated mental illness, one formerly homeless woman responded, "I didn't want your sympathy, but I did want your empathy. I wanted to be just like you."

Of course, those with severe mental illness are like us, they are just sick. They are like us just as the cancer, heart, and kidney patients are like us. Because they have a mental illness and a behavior aspect to that disease, SPMI offenders deserve a chance to manage their illnesses while being accountable for their behavior.

CRC is not for every SPMI offender. Some people are beyond the safety and therapeutic abilities of this court. They are too delusional and too dangerous to risk management under this model.

And some crimes are episodic in nature. For example, an offender who committed a crime as a result of a failed marriage or other despair. That offender is often managed with the help of his personal mental health provider, and monitored for a shorter period than an SPMI offender.

What Does it Take to Start a Mental Health Court?

A district attorney, chief district judge, interested defense bar members, and access to case management by an LME or other

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Everything I Know About Being a Lawyer I Learned in Second Grade

By Emilia Beskind

I conducted my first successful cross examination in a public school classroom a year and a half before I went law school. The cross took place at 7:45 a.m. in New Orleans' Ninth Ward shortly after my students had handed in their homework. As I leafed through the assignments, one stood out. I called its owner up to my desk and began:

Q: This is the writing homework you turned in, right?

A: Yes.

Q: You remember what your writing assignment was, don't you?

A: Yes, we were supposed to write something in our journals for ten minutes.

Q: You didn't do your writing homework last night, did you?

A: I did my homework. You're holding it.

Q: Well, it's in your handwriting, but it's not your ideas?

A: Yes they are!

Q: You copied it from a book?

A: No, that didn't come from a book.

Q: Go ahead and read me the first sentence of what you wrote.

A: [Student reading aloud] In the beginning God created the heavens and the earth…

Q: That came from the Bible.

A: How did you know?

That student entered my second grade classroom not knowing all the letters of the alphabet and left as a beginning reader and writer. By the end of third grade, she was reading and writing at grade level and at the closing assembly she read a beautiful speech she had written on Martin Luther King. Her achievements were particularly impressive because during that exchange about her homework I asked her why, of all books, she chose to copy from the Bible and she had responded, "I had to use it, it's the only book in my house."

Teach for America

Teach for America (TFA) recruits, trains, and places recent college graduates in underserved urban and rural public schools to teach for two years. The design of the program was Wendy Koop's senior thesis at Princeton. She envisioned an organization that would help close the academic achievement gap between impoverished students and their more privileged peers by placing enthusiastic and service-minded young educators in low-income classrooms. Her Princeton professor said she

was "quite evidently deranged."[1] Thankfully, she ignored him and in 1990 founded TFA with 500 corps members. Twenty years later, TFA works around the country—including in Eastern North Carolina—and last year placed more than 7,500 teachers in public schools across the country. A 2005 study showed that 75% of school principals consider Teach for America educators more effective than other teachers and a 2004 study showed Teach for America students do better than other kids in math.[2] Though some TFA corps members stay on in education, most don't. For those who move on, TFA's goal is that its alumni will succeed in other endeavors, become leaders in their communities, and positively influence education policy based on their own experiences teaching in the corps.

Like me, most TFA Corps members were not education majors. I joined TFA directly out of college having been a political science major. I knew elementary education would not be my career. I was reasonably sure that law school was in my future, but I thought that working for a couple of years would give me some real world experience and a better sense of the direction in which I wanted to go. I had spent time in undergraduate school, and during my summers, working for organizations handling post-conviction death penalty cases. I had seen and understood the economic inequality of the death penalty's application. Most of the defendants I had worked with grew up desperately poor and with little education. In thinking what to do before law school, what drew me to TFA was its mission to close the equality gap in education—the disparity between the academic performance of students who grew up with even modest financial resources and those who grew up in poverty. Teach for America seeks to close that gap by creating classrooms where students have diligent and involved teachers who, despite inexperience, create an environment where students want to learn. Nobler aspirations aside, I also thought teaching would play to my strengths. I like kids and I have always enjoyed public speaking. As I recall, I thought teaching would be me standing in front of a group of kids giving them lectures on the assigned curriculum...with recess.

Learning and Teaching

If you have ever been a teacher or raised children, you're laughing at my naiveté. Luckily, TFA anticipates that new corps members may have unrealistic assumptions about teaching and knows they need to take recent college grads that have excelled in academics and prepare them to do something incredibly difficult—experience failure on a daily basis, at least at first. It sends all new corps members to a boot camp during the summer before they start. At these TFA "Institutes" around the country, participants spend five weeks teaching in the morning at local summer schools and the rest of the day taking instruction on methodology, behavior management skills, and ways to track student performance.

When I arrived at my Institute, all I knew was that I was to be an elementary school teacher in New Orleans. I didn't know what grade or what school. It wasn't until I got to New Orleans that I was placed in a sixth grade classroom. The next day 35 students walked into my classroom, and despite TFA's best efforts, I was utterly unprepared. I spent the next two years teaching sixth and second grades at two different schools. I coached volleyball, attended school plays, spoke at a church funeral for a student's mother, attended an eighth grade student's baby shower, cried in the restroom, and worked harder than I ever had before. Teaching, particularly during the first year when most teachers are wholly incompetent, can be grindingly difficult. But with experience and increasing competence, teaching has phenomenal rewards. There are the student success stories and those personal moments. It was very gratifying to be told by my principal one day that not only were my students the best behaved in the cafeteria, but that she also heard them talking about our morning language arts project throughout lunch. I doubt that the language arts project changed the course of any student's life, but I am so proud that almost all of my students left second grade reading at or above grade level. I came to love my students and had intended to stay in touch with them. However, Katrina washed away their school, their church, and their community, scattering them into cities across the South.

I knew when I left New Orleans that I would focus on indigent defense in law school. My experience in the Ninth Ward enabled me to understand the social forces that create an almost inevitable pipeline of young people from schools in disadvantaged communities into the criminal justice system. After finishing law school at Duke, I accepted a Prettyman Fellowship at Georgetown Law. During my first year, I worked out of the Georgetown Criminal Clinic as a public defender trying misdemeanor and felony cases for indigent criminal defendants in DC Superior Court. Now in my second year, I still have my own case load, but I also supervise third year law clinic students as they try cases under DC's student practice rule. In some respects, I am still teaching, but representing indigent criminal defendants has been the bulk of my work. After my fellowship ends this summer, I will be a public defender.

Lessons Learned

I have had the benefit of an excellent legal education, but I am a better lawyer because I was a teacher. Many of my lawyering skills were significantly formed by my time in Teach for America. I am not saying that talking to a District of Columbia jury is like talking to sixth graders, but some of the same communication principles work. TFA taught me to use clear structure in my teaching. One of the first teaching principles I learned was the rule of three: "Tell them what you're going to teach them, teach them, and then tell them what they just learned." Trials are really about teaching jurors. An opening statement tells the jury what's coming. The evidence offered are the facts being taught. And closing argument is showing the jury in a persuasive way what they've just learned from the facts. So, whether in the classroom or the courtroom, the communication principle is the same.

TFA taught me that persuasion is the combination of understanding your audience and tailoring your message with creativity to suit that audience. We learned that every class and every student was different and it was our job to reach them all. As a teacher, every day I practiced persuading 35 seven-year-olds to go places quietly in a line. No one method worked. Instead, every day I employed a combination of different strategies, none of which could contradict each other, to move my students. Trials involve persuading far fewer people, but the essential skill of creatively shaping your argument to fit each member of your audience without internal inconsistencies is no different.

Another transferrable lesson learned from teaching is the importance of understanding community and culture. The level of poverty in the Ninth Ward community was something I had not experienced before in this country and it was a process to come to grips with the innate cultural differences of my students' community. At the start of a school

year, teachers write a letter introducing themselves for students to take home. I started mine, "Dear Parents." No, that wouldn't work. Several of my students were being raised by family members other than parents. So, I started again, "Dear Parents or Family Members." No, some of my students were being raised by foster parents or legal guardians. And then, "Dear Parents, Family Members, or Legal Guardians." Not quite, because several students were living in group shelters and at least one in a car. Eventually, I just said, "Hey." Does poverty take its toll on families or is the lack of families a factor causing of poverty? Whatever the cause and effect, all my own assumptions about children being able to rely on parents for support and structure were wrong. They might have had support or structure in their lives, but it came in varying forms. Now, when writing an opening statement or a closing argument, I am mindful that the common references one may learn from your parents often have little resonance to jurors from impoverished communities. My job is to find the references that work across communities without regard to economic condition. So, where I might have talked to a jury about what we learn "from our parents," I now know to speak in terms of what we learn "growing up."

Teaching also taught me about cultural assumptions. I knew that my students, some of whom lived in homeless shelters and many of whom grew up in terrible poverty, would have a different set of experiences and expectations than I had as a child. But, I was still surprised by how different some basic childhood experiences actually were. Early in the school year, one of my students lost her tooth. I stopped class and made a big deal of it. I put the tooth in an envelope with some stickers on it and gave it to the student to take home for the tooth fairy. I was surprised when the student didn't know what the tooth fairy was. So, I explained it. Shortly after, my students, who were newly introduced to the idea of the tooth fairy, began wiggling their own loose teeth. By the time I looked up, five or six students had pulled out teeth that were not really ready to come out. My cultural lesson that day was walking a group of children with bloody faces and clothes down to the school nurse and receiving such a withering look from her that for the rest of the year I would duck around a corner if I saw her coming. I had assumed that everyone knew about the tooth fairy. As I prepare trials now, I think of that episode and ask myself what I have assumed from my own life that may not be true for those I seek to persuade.

Of course, teaching did not teach me everything I needed to know about cultural habits. Recently, I noticed that when I visited clients at the DC jail on weekdays, or even Saturdays, they were glad to see me. On Sundays, however, my clients were short with me and generally not happy to see me. After weeks of this, I finally asked one client what was up. His answer was simple, "Sunday is the Redskins game." Who knew? I'm still learning.

Perhaps the most important life lesson I learned from teaching was the importance of looking at the whole person rather than simply looking at negative actions. I had students who were incredibly disruptive, but I never had a student who was only incredibly disruptive. TFA teaching taught me to focus on a student's positive qualities and abilities and not just negative behaviors and learning deficits. Over my two years, I learned that the labels "bad student" or "behavior problem" can be hard to shed and can become self-fulfilling prophecies.

This lesson follows me to the lock up at the courthouse where I meet many of my clients for the first time. Everyone I meet there is accused of a crime. But none of them is only an accused criminal. While preparing sentencing arguments, I research old school records and see clients going from being in the normal range of student behavior to being a "bad" student, to failing academically, and then quitting school. Teaching taught me to find their positive qualities. This can be essential in explaining to judges why, for my clients, there are better options than prison.

The Poverty Parallel

When I was a TFA teacher, people were universally positive about my work. They would tell me I was helping save the world or doing God's work. I often heard "how wonderful" or "what a great program." Now, when I say I represent indigent people accused of crimes, I hear, "Does it bother you that most of your clients are guilty?" or "How can you represent people like that?" Abroad in our country is the belief that teaching students in disadvantaged schools is both admirable and socially valuable, while defending indigent clients against criminal charges is dangerous to society and even morally questionable. Teachers teach "good" children; public defenders represent "bad" criminals. It's an odd distinction since TFA Corps members and public defenders both provide direct services to the same population. Most of my current clients attended the kinds of public schools where TFA places corps members. TFA's goal is giving low income students the same access to high quality education as their wealthier counterparts. Public defenders work to give indigent clients the same access to justice as those who can afford a lawyer. At their heart, both jobs are about ensuring equality of opportunity.

Someone recently asked me why so many TFA alumni become public defenders. I suspect many former corps members feel that as public defenders they have the opportunity to help clients who fell through the cracks in the educational system after being labeled "bad." My friends from TFA who now work as public defenders each have a story of the moment that pushed them towards public defense. John, a sixth grade boy, is my story. On his bad days he would get loudly frustrated, had trouble following class rules, and often came to school hungry in dirty clothes. On good days he was warm, funny, charming, and leader in the classroom. On one of his really bad days, I shouted out his name to get his attention. When he didn't look up, I realized I had called him "Jake" not "John." Jake was a death row inmate I worked with one summer while in college. I suspect that I was subconsciously worried that John, who was headed to middle school, might get lost in the system and end up where Jake was. Twenty years ago Jake's sixth grade teacher may have had similar concerns. John would be 18 now. I lost contact with him after Katrina. I very much hope his exposure to a TFA teacher nudged him in the right direction. But, if he ended up in the criminal justice system, I hope someone is fighting for him. ■

Emilia Beskind is a second-year E. Barrett Prettyman Fellow at Georgetown University Law Center and will receive her LL.M in 2010. She graduated from Duke University School of Law in 2008.

Endnotes

1. *The 2008 Time 100*, Wendy Koop, Time Magazine, April 30, 2009, www.time.com/time/specials/2007/article/0,28804,1733748_1733754_1736227,00.html.
2. *Id.*

Reflections by a Novice Judge

By Nancy E. Gordon

Being a judge is an extraordinary privilege and opportunity. It's a privilege to rise to the position of judge after over 25 years of lawyering. It's a privilege to serve the public and a community that I love. Serving as a judge is an opportunity to imagine, from a different perspective, a better legal system, to work toward a more efficient and effective system, and to use my talents to understand how the system works best.

Being a judge is a very public position. One loses one's name because "Judge" or "Your Honor" will suffice. And one spends the workday reacting to controversies and disagreements brought before you, trying to find your own rhythm and balance, and trying to find the middle of the dispute. Unlike the years spent as an attorney advocating for one side, a judge finds himself or herself in a completely different role where the job is to balance two sides and determine a fair resolution. In the past two and a half years, I've spent time cogitating about the various changes that my new profession has brought about in my life, struggling to balance some of the changes and learning to balance the daily challenges each day brings. I've been asked to write about being a novice judge, so let me start with something that speaks to me about my new profession:

God grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference. —Serenity Prayer

I'm often asked "Do you like your job?" And, "What's it like to be a district court judge?" When asked by lawyers about this job, this is what I've wanted to say:

Imagine that you are sometimes compelled by the law or the facts (or both) to render a decision which is unpopular or that you don't like. . .

Imagine always feeling compelled to self-sensor everything you say even with your closest friends and professional colleagues. . .

Imagine that if you forward a joke email that you thought was funny but was at best impolitic and, at worst, offensive, your name would be splashed across the local newspaper. . .

Imagine that when you go to the local grocery store you might cross paths with someone you don't recognize, but someone who knows who you are and is very angry with you. . .

Imagine that you are really not comfortable talking with the very people you thought were your friends because you're in that strange place: professional isolation. . .

Imagine that you hear from colleagues and people associated with your profession that your fellow judges, as a group, suffer from narcissism and that everyone knows judges don't work very hard. . .

And imagine that you never really know how well you're doing your job because you

hear snarky comments passed along behind your back and you don't have a means to measure your progress or effectiveness other than an election every four years. . .

Imagine that you are asked to take a voluntary pay cut. . .

Now imagine that every day you go to work and put in not only a full work day, but you take work home with you. . .

Imagine that you wake up in the middle of the night worrying or dreaming about whether you made a good decision that afternoon at work. . .

Imagine that you are very proud of how hard you work, the example you've set, and the efforts you've made to do the very best job that you can do. . .

Finally, imagine that you love your job, you enjoy the daily challenge of your workplace, and you are incredibly proud to work in your chosen profession. Welcome to my world as a novice judge.

"If I am not for myself, who will be?
And if I am for myself alone, then what am I?
And if not now, when?"

—Rabbi Hillel, Pirke Avot 1:14

On January 1, 2007, I was proud to be sworn in as a district court judge here in Durham County. Before that time, I'd been in private practice since 1979, primarily as a family law specialist. Since my first day on the bench, I have presided over criminal court, traffic court, family court, first appearance court, civil court and Family Drug Treatment Court. In doing so, I've seen thousands of individuals, dozens of lawyers, and made thousands of decisions—most, I hope, were good, and some, I regret, were perhaps not so good. I've worked hard to recognize my biases, to restrain my impatience and temper, and to understand what my role is in our justice system. I have appeared at community forums where I've been asked why we judges set bonds so low that criminals get out of jail when they are charged with serious crimes. Most recently at a meeting of community activists, I was asked how I balance the rights of innocent victims with the rights of criminals; it is a particular goal of mine to educate the public about how the court system works. I've had the privilege to attend courses on judging at the School of Government in Chapel Hill and the Judicial College in Reno, Nevada. And I've learned a lot about why being a judge isn't simply being a lawyer wearing a robe. Being a judge is its own profession and is truly a place of honor from which one can perform great public service.

Of the many things that I've learned, let me share four observations.

First, and this is nothing new to those who work in our criminal justice system, a great percentage of the people in our criminal courts, on probation, and in our jails, suffer from drug or alcohol addiction and/or mental illness. District court judges do not sentence the most serious and dangerous criminals—other than DWIs, our sentences range from community punishment to 120 days of incarceration. The criminals we sentence will be out of jail sooner rather than later. Many of the people coming to my courtroom have drug problems, either presently or historically. Many are homeless and mentally ill people charged with trespass or misdemeanor larceny. We have too many substance abusers and mentally ill people in our criminal justice system. These individuals need treatment that, more often than not, isn't available, particularly once they enter the criminal justice system; when people who are ill are incarcerated, it's only logical to expect that they continue in the same ill health when they get out of jail. Ergo, we have the "revolving door" that the public complains about. In addition to their addictions, mental illnesses, and cognitive limitations, these individuals now have a criminal record which severely restricts their employability and ability to function as productive adults. The community is not well served by the system we have. Changes in this arena must come from the legislature, not the bench. It is this reality that frustrates and angers the public who look to hold judges responsible for a system judges don't really control.

Second, therapeutic courts work. Before I began working as a judge, if anyone had told me that the court I would feel represents my greatest direct contribution to our community would be Family Treatment Court ("FTC"), I would have laughed. Okay, I probably would have guffawed! I am hardly a social worker or hugger by nature. Nevertheless, I treasure my hours in Family Treatment Court. And I am the most challenged there as a judge, meaning that court makes the greatest demands on my temperament, my perspective, my working to eliminate my biases and treat all clients the same, and my work to make just and fair decisions to help people change their behaviors and lives.

If you've never seen how a drug treatment court works, you might check it out. For a minimum of one year, drug court participants are held accountable by frequent and regular appearances in recurring court appearances before the assigned judge where they are rewarded for doing well and sanctioned when they do not live up to their obligations. Parents are reunited with children through FTC and criminals stay out of the system with the help of Adult Treatment Court. The personal engagement that a drug court judge has with each participant is unique, particularly given the volume of our court dockets and the time limitations imposed by the need to get all of the work done. Drug courts are worth the time and effort. They save money and change lives. My next project: I'd like to see us start a Veteran's Court here in Durham.

Next, our courts have an increasing number of self-represented litigants coming into the family court and civil system—they are a growing burden on limited court time and judicial resources. Judges must reasonably accommodate these *pro se* litigants to make sure they have the opportunity to have their matters fairly heard without violating the principle of judicial impartiality. The great number of self represented litigants demands that judges assume a more interactive role with them and that requires a careful balance. This is a great challenge for our judges, particularly our family court judges, as well as for attorneys who are more and more frequently faced with self-represented opposing parties.

Finally, to paraphrase another judge and our newest Supreme Court justice, "A wise woman can make a decision at least as good, and perhaps better, than a man." In 2009, only 8% of our superior court judges are female. We are better represented at the district court level (29%) and the appellate level (37% on the Supreme Court and 27% on the court of appeals). District court judges are elected every four years. After the *Republican Party of Minnesota v. White* (536 U.S. 765 (2002)) decision, it's concerning that judges may be viewed by the electorate as too cagey when we take the position that it is inappropriate for judicial candidates to talk about the political issues the public expects. As a woman judge, I emphasize that it is important to be mindful

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Raising the Bar for Federal Judges and Lawyers

By Forrest A. Ferrell And W. Carleton Metcalf

The state of North Carolina sports seven law schools and 100 county courthouses. Now, it also has its first chapter of the Federal Bar Association (FBA). Recognizing a necessity for an organization that focuses primarily on the needs of federal judges and practitioners, a group of lawyers and judges in western North Carolina has formed the western district of North Carolina Chapter of the FBA.

A History of Support for Federal Courts and Lawyers

Founded in 1920, the FBA was originally designed as a professional organization to serve federal judges and government lawyers involved in federal practice. In the 1980s, attorneys engaged in private practice, along with law students, were allowed to join the FBA's ranks. Since then, the FBA's membership has swelled to over 15,000 members across the United States.

Some of the purposes of the FBA are:

- To serve as the national representative of the federal legal profession;
- To promote the sound administration of justice;
- To enhance the professional growth and development of members of the federal legal profession;
- To promote high standards of professional competence and ethical conduct in the federal legal profession;
- To promote the welfare of attorneys and judges employed by the United States government;
- To provide meaningful service for the welfare and benefit of the members of the association;
- To provide quality education programs to the federal legal profession and the public; and
- To keep members informed of developments in their respective fields of interest.

These purposes are achieved through a variety of means. Headquartered now in Arlington, Virginia, the FBA and its chapters sponsor approximately 700 hours of continuing legal education events and classes annually. The topics of these offerings run the gambit from federal procedure to substantive areas such as criminal law, Indian law, and tax matters.

Through its related foundation, the FBA provides scholarships for law students as well as financial support for programs such as Books for Africa.

FBA members represent nearly every sector of the legal community, from small to large law firms, attorneys serving in-house with corporations and federal agencies, and members of the judiciary. The FBA is the catalyst for communication between the federal bar and the bench, as well as the private and public sectors.

A New Presence in the Tar Heel State

Though the FBA has over 80 active chapters across the country and in Puerto Rico and the US Virgin Islands, no chapter had been located in North Carolina. According to the FBA's Executive Director, Jack Lockridge, the national organization had long been interested in establishing a chapter in our state. "North Carolina lawyers and judges, such as the late Robinson O. Everett, have been members of the FBA, but in years past the idea of beginning a chapter in North Carolina just did not seem to take root. That situation changed last year."

In September 2009, a group of lawyers and federal judges from across the western district joined together to petition the FBA to grant a charter for the group. The application was allowed by the FBA's Board of Directors that same month and a charter was presented at the FBA's annual meeting in Oklahoma City shortly thereafter.

Since then, the chapter has proceeded to elect its first slate of officers, pass bylaws, and begin the business of planning events. Also, as of the writing of this article, another group from the middle district has begun the process of establishing a separate chapter in that area.

W. Carleton Metcalf, chair of the litigation practice group with the Van Winkle Law Firm in Asheville, helped lead the charge to establish the western district's chapter and was elected as its first president. "A few years ago, I happened upon the FBA and, since I often handle cases in federal court, I became interested in the organization and joined as an at-large member. The more I learned about the group, the more I realized how a chapter could help our district," Metcalf said. "When I took the idea to some members of our bench and bar, we all agreed it would be a strong asset to lawyers and judges in western North Carolina."

In addition to Metcalf, US Magistrate Judge David S. Cayer serves as vice-president of the chapter, while assistant US attorney Amy Ray holds the position of secretary. Retired superior court judge Forrest Ferrell was elected as the chapter treasurer. The remaining members of the founding group are Mark T. Calloway, the Honorable Robert J. Conrad Jr., C. Frank Goldsmith Jr., David L. Grigg Jr., the Honorable Dennis L. Howell, the Honorable David C. Keesler, the Honorable Graham C. Mullen, the Honorable Martin K. Reidinger, Annette E. Tarnawsky, the Honorable Richard L. Voorhees, and the Honorable Frank D. Whitney.

The Road Ahead

The group is clear that it does not intend to infringe on the territory of other bar organizations. According to Metcalf, "The North Carolina Bar Association has a very strong history and place in North Carolina's legal circles. Likewise, our state's attorneys are recognized participants in the American Bar Association, not to mention numerous local bar groups. We fully understand that many, perhaps even most, of our chapter's members will be involved in other organizations. However, since the FBA is a bar association oriented directly toward federal judges and those appearing before the federal courts, we plan to offer programs and services that are specifically tailored to meet their needs."

Magistrate Judge Cayer agrees. "There are many fine attorneys practicing in western North Carolina. The western district's chapter of the FBA will assist those who are already familiar with our federal courts to increase the level of their practice, while at the same time helping lawyers who may be less experienced in federal court understand how that forum operates."

The group has been hard at work planning events targeted toward those in federal practice. "The western district includes four divisions that are spread over a large geographic area. Our goal has been to sponsor events on different topics in locations across the district so that as many lawyers as possible can take advantage of them," reported Metcalf.

At press time, introductory receptions were scheduled for February in Asheville and Charlotte. In addition, the group plans to hold its Mid-Year Meeting, which will focus on civil practice in the western district, on April 23, 2010, in Asheville. The chapter's Annual Meeting will center on criminal practice and will be held in Charlotte in October.

Persons interested in the western district's chapter are invited to view the chapter's webpage at www.fedbar.org/WDNC. html or to contact one of the chapter's officers. Additional information about the FBA generally can be obtained from the FBA's national office at (571) 481-9100 or its website www.fedbar.org. ■

Forrest Ferrell is a retired senior resident superior court judge from Hickory, having served 22 years. He now practices law in Hickory and is a member of the North Carolina State Bar Council.

W. Carleton Metcalf is a principal with the Van Winkle Law Firm in Asheville, North Carolina. He maintains a litigation practice in which he regularly represents businesses of all sizes that are involved in commercial disputes before federal and state courts.

Novice Judge (cont.)

of the interrelationship between judicial independence and judicial diversity, particularly in light of the concerns about gender and racial bias in judicial performance evaluations and the diversity of people in our court system. I bring to the bench life experiences, common sense, legal scholarship, a strong work ethic, and my understanding of the law. I will continue to work to make fair decisions based on the law and facts, free of the influence of other political institutions and without regard to whether my decisions are well-received by the public. I know that I am committed to being a good judge—I have many, many role models, supporters and encouragers. And I continue to grow a thicker skin to withstand the vagaries of being a public official and the criticism of my decisions which is to be expected, is part of the job, and is healthy in a democratic society. As it is said "If the going is real easy, beware, you may be headed downhill." ■

Judge Nancy Gordon became a district court judge in Durham County after a 27-year career practicing law. She is a board-certified family law specialist and is less of a novice judge with each passing day.

A Worrisome Letter

By Greg Grogan

I received a letter from the Honorable Judge Silas Roe. It was Thursday, May 1, 2008. He is a judge in my district with a brutal reputation. The newspapers say he is mean to everyone and would hold his mother in contempt. I'm not sure if that's true, but I am sure that I never wanted to find out. I'm called a transaction attorney, or a business attorney, or even a real estate attorney. I'll gladly go by any title if it'll keep me out of a courtroom.

I was sitting at my desk happily minding my own business. The mail carrier made his stop, and after taking my mail from him, I flipped through the usual assortment of bills until I came to the envelope from a judge's chambers. I found it strange because it was addressed to me personally and not to the name of my law office. Inside I found a letter, on the courthouse letterhead, and the words I had to read twice:

Mr. DeCarlos:

The Honorable Judge Silas Roe requests your presence at his courtroom on Monday, June 9, 2008. Please make every effort to be present, and if you cannot attend please contact our office. Thank you.

It was signed by the judge and that was all the information. I'd never received such a notice before, and I was dumbfounded. I started to call the judge's office to see if this was a joke, but who would pull this stunt and why? I decided that the letter was real. Then I decided that maybe I'd better figure out what was the reason behind the letter. I reread all my open files. There seemed to be no problem there, but I would check closer the next day. I'd also have to check all my closed files and see if anything jumped out at me.

I fidgeted around until closing time and went home. When I walked in the door I was greeted by my wife. Mary Stringer had been my kindergarten companion. We met when I ran over her at recess one day. I was playing freeze tag with some new friends, and I stopped looking where I was going in order to avoid being made "it." I was running full steam ahead when I suddenly felt myself crash and fall to the ground. I looked underneath me with the intention of letting the person interfering with my escape feel my wrath. Instead I saw this set of warm blue eyes that took my breath. Teachers rushed over to pick us up, but I made sure the hand Mary held when she was off the ground was mine. I will never forget our first conversation. She started it.

"My name is Mary. You busted my lip I think."

"My name is Odd, er, Odell DeCarlos and I didn't mean to run into you. I was just trying not to get tagged."

"You should say you're sorry."

"I'm sorry."

"You are the one they call 'Odd.'"

"It's a nickname. My name's Odell Donald DeCarlos."

"I won't call you that. I'll call you Odell or lip buster, but not Odd." Mary stuck by that for several months, but the peer pressure built up too much. Finally, with an apology of her own, she began calling me Odd. By then we were a regular item at the school and we've never been apart since.

"I received a letter from Judge Roe. He wants me in his courtroom on Monday morning."

Mary stopped shuffling her papers and gave me a look that said "Are you serious?" I can't explain that look, but I know it when I see it. I continued. "No explanation as to why. I'll find out when I arrive."

"Aren't you going to call?"

"I thought about it. If he wanted me to know then he could've put it in here."

"I don't think I could wait. It'll keep you up tonight and you know it."

"Thanks, and this conversation helps. Let's change the subject. What're you grading?" Mary's a teacher. She knew even in kindergarten that she had a calling for that line of work. She started out as a math teacher, but eventually switched to teaching history. She hates it when I take an interest in her work. I read her text books and remark about the books' inaccuracies. I'm against political correctness in all its forms, and I don't believe fifth graders need to start out learning history from a slanted point of view. Mary sees things differently.

I woke up Friday and I made a resolution not to worry about the letter. That lasted about ten minutes or until I made it from breakfast to the shower. Then I kept trying to consider all the possibilities, but really came up with none that sounded plausible. I kissed Mary goodbye and she headed off to school. I climbed in my car and headed for my office. Living in a suburb of Raleigh meant not having a long commute. Not having to leave my little town meant an even shorter commute than most. I was at work in under 15 minutes.

I made it a policy to check my emails and return my phone calls each and every day. Then, first thing the next day, I check messages again to see if someone called during the night. Sure enough, a lady named Kathy with Judge Roe called to make sure I would be in attendance on Monday. My level of

The Results Are In!

This year the Publications Committee of the State Bar sponsored its Sixth Annual Fiction Writing Competition. Eight submissions were received and judged by a panel of eight committee members. The submission that earned third prize is published in this edition of the *Journal*.

anxiety grew. Not only was I now sure that the letter was no hoax, but the judge has double checked on me. This meant he has something planned for me. Still, Kathy's phone call gave me the opening I needed to call the judge. I remember picking up the phone and dialing the numbers.

"Good morning. You've reached Judge Silas Roe's office. This is Kathy speaking."

"Good morning. This is Odell DeCarlos calling and I'm scheduled to be in your courtroom on Monday. I was calling to confirm I'll be there."

"Oh good. The judge has asked me a couple of times if you'd called. I'll be sure to let him know."

"Kathy, do you mind telling me what this is about? The letter gave no indication."

"I'll try to look and see." I waited for a couple of minutes before she came back on. "I'm sorry Mr. DeCarlos. There's no indication on his calendar. He hasn't told me and I'm afraid he won't be in the office today."

Frustration set in, but I had to be careful with Kathy. Making a judge's staff mad is an easy way to ruin a reputation and career. All of us lawyers pretend we're not at the mercy of people like Kathy, but in reality we know that people like her can do us a lot of damage. I politely ended the conversation, and then said my true feelings once the receiver hit the cradle.

I picked up the day's paper from my door step. The brown room lightens up with the glow of the daily news. The economy's still struggling. The campaign was still going strong, and North Carolina is up for grabs. The Tar Heels were recruiting hot and heavy. Then my eyes found a story about Judge Silas Roe. I recognized his picture and then the headline got my attention:

Judge to Attorney - "Be ready for trial or be ready for jail!"

This was just what I needed to see. It seemed that the Honorable Judge called a civil case to trial and the attorneys for the plaintiff requested a reset. The judge, unhappy with the pace of the proceedings, told the plaintiff and the plaintiff's attorney team that they had one day. They would go forward with their case at that time or they would be held in contempt. The article continued on with examples of the judge holding defense attorneys, prosecutors, and civil litigation attorneys to a tough standard. The article concluded with a mention of the judge's former prosecution days, and how the local citizens are lucky to have such a forceful judge on the bench. Again, what could this guy want with me?

I put down the paper and went to my computer. My Hewlitt Packard is my second best friend. All my work gets saved on here, and I never have to argue with it. My early career was much different than what I do now. I remember getting out of law school and wondering what I'd do. I landed a job with a solo practitioner, like myself, who did a little of everything. He dabbled in real estate, wills, elderly law, bankruptcy, divorce, and just about anything else that would pay the rent. He was moderately successful, but he couldn't afford to keep me around for long.

I left his office and went to the district attorney's office. I was immediately put in a trial division since I had some experience. I protested that my experience in the courtroom was limited to filing documents in probate court, but apparently that was more than many of the others that came on at the same time. I'll never forget the first day on the job.

I walked in and met the man who was going to be my trial partner. His name was Bob Stafford. He was a nice enough guy and we were about the same age. He showed me his office, my office, and then told me he had court that day. Our supervisor told me to tag along since it was my first day. We walked over to the courtroom and he told me about Judge Melvin Howard. Judge Howard, it seemed, liked having jury trials. They interested him, and since he didn't have to prepare or round up witnesses, he decided to have one as often as possible. My trial partner felt sure he was going to have trial this day so I could watch how it went.

We entered the packed courtroom and I watched him walk to the front of the room. He met with defense attorneys and placed himself at the table for the prosecution. Soon the judge came out and called the courtroom to order. A few pleas were taken and the judge lined up the first case that was going to be a trial. Bob asked if he and the defense attorneys could approach the judge's bench. The judge looked confused but agreed. I could hear only whispers as they talked, and then the judge broke out in a smile. He called out my name and asked me to approach his bench. A little shocked, I awkwardly got to my feet and willed my legs to move me up to the front of the room.

When I reached comfortable speaking distance, the judge smiled down at me and said, "Mr. DeCarlos, I'm told you're to be a prosecutor in my court. I look forward to seeing you in action."

One thing that Bob hadn't mentioned was the judge's voice. I had heard deep voices, but this voice sounded lower than a whale's moan. I'm not sure Barry White could've touched these deep tones. It also had a powerful force behind it that I swear made my hair blow backwards as he spoke. My ability to move, speak, or show any signs of life left my body. I remember feeling sweat suddenly appearing on my hands and head, otherwise I might as well have been a mannequin that someone delivered to the court. The judge continued smiling.

Luckily, Bob sensed the rising panic in me. He turned and started talking to the judge as if it were he the judge had been addressing all along. "Judge, Mr. DeCarlos comes from a general practice firm that did very little in the courthouse. He's new to jury trials so I'll be with him to start."

The judge nodded and smiled again. I found my voice, somewhat, and shakily thanked the judge for his time. The judge laughed and I quickly walked away. I found my seat in the back of the courtroom and took the next few minutes to recover and settled in for an entertaining afternoon. I looked around me at the sordid collection of human beings. I tried to decipher if I was looking at a witness, a defendant, or a victim as I studied the different people. There were people walking in and out of the courtroom, and the scene was one of controlled chaos. I found it pleasant until I heard my name being called.

At first, I thought I must've imagined it. Who'd be calling me? Then I looked around again, and again I heard my name. I finally looked up at the front of the room and saw Judge Howard waiving. I rose and walked toward the bench in a daze.

"Mr. DeCarlos, your trial will begin in about 30 minutes. It's almost lunch time, so get everyone ready and we'll begin after I eat last night's leftovers."

I stood staring for just a moment trying to understand what I'd just heard. "Excuse me, your honor, but did you say 'my case' would be starting? I'm afraid I don't understand. I don't have a file or a case. I was sent here by my supervising attorney to observe."

"Mr. DeCarlos, you were hired by the district attorney were you not?"

"Yes sir."

"You are an attorney are you not?"

"Yes sir."

"Then you are ready to try this case."

"Your Honor, I'm not at all ready to try this case. I don't know the defendant's name. I don't know what he's charged with. I don't know the location, names, or trustworthiness of the witnesses. I don't even know the location of the case file."

"Mr. DeCarlos, I gave you 30 minutes. Make yourself ready."

"Your Honor, you cannot possibly expect me to get totally ready in 30 minutes on a case I've never seen."

The judge sighed. That's never a good sign. "Again, you work for the district attorney's office don't you?"

"I do today your honor, but if you make me go to trial then I might not tomorrow."

"Let's worry about tomorrow when tomorrow comes. See you in 30 minutes."

That was my introduction to life in the prosecutor's office. I managed to find the file, locate my witnesses, and pick a jury. After the jury was picked I discovered that I had a possession of cocaine case. My arresting officer did a great job testifying as did his backup officer. Then my crime lab witness, who had never received a subpoena, got stuck in traffic and the judge dismissed my case. I went home to Mary and told her the whole story. My life had taken a dramatic turn.

The phone brought me back to reality and the present. Mary called to remind me that I needed to get home early tonight. I needed no reminder. I had forgotten our anniversary before, and I paid the price. This time I was taking Mary into downtown Raleigh for a very nice dinner and maybe a carriage ride around the town. We always enjoy our trips to Raleigh, even though they are rare, and I enjoy hearing a tour guide tell me all about the big city where I grew up. I sometimes think I want to retire and be a tour guide. Share my knowledge of the city with others and enjoy the atmosphere of the area. Then I realize I only want to reminisce and make others enjoy my stories. I probably wouldn't be a popular guide.

As the day went by I worked on a couple of articles for those same trade magazines I had received in the mail. I'm not a writer by profession, but I do occasionally get asked to submit articles on a few topics. I have written on commercial and residential real estate, contract preparation for the buying and selling of business entities, and setting up a corporate structure. I take great pains in my writing. I've read pieces where it was obviously not the writer's best work, and I've never wanted to be lumped in that category. I never receive much feedback, but they keep asking me for submissions so I take that as a good sign. The nature of my work doesn't lend itself to going out in public, so I grasp at what other attorneys might think. Getting caught up in my work also makes the day go faster. I only thought about my upcoming courtroom adventure about ten times before lunch, and only about ten more times after lunch. Even with all that thinking I'd found no answer.

At 3:00 I packed up my work and headed home. I beat Mary home, which is unusual, and I showered for our date. We rarely get a chance to go out alone. We have two children, but both are in college. They come home on weekends from Chapel Hill to do laundry and get free food or health care. Our son, Ronald, is going to be a pharmacist he says. He's only a freshman so we'll see. Our daughter, Rachel, is a junior and is planning on being a teacher like her mother. That I believe. She spent her life taking care of her little brother and playing school.

Mary came in the door and brought me back, again, to the present. She showered and changed her clothes to something fancy. We jumped in the car and took off for a place called Bravo. It was a restaurant I had read about in a magazine, and made the reservation a few weeks earlier. The place was supposed to have great views and great food. Once we arrived we stepped inside and surveyed the scene. Very formal with white table clothes and expensive silverware. The room was painted an off white color and the heavy drapes are a shade of dark raspberry. We took our seats next to large windows that provide a clear view of the skyline. At this point the place was winning me over and I hadn't even tried the food.

The waiter goes to get our drinks, and we begin our annual teasing. I started. "So, Mary Stringer DeCarlos, why did you marry me 27 years ago today?"

"Silly. For your money. I figure any day now we'll be on easy street. Besides, your brother wasn't interested in me. Why did you marry me?"

"You were the best looking girl in the school, and my dad said I should." I ignored the comment regarding my brother. He was always more popular than me.

"Ha! My dad said Odd DeCarlos was nothing but trouble." When she said this I felt her foot rub on my leg. Still playing "footsie" after 27 years!

"I always said he was smart. You know, in all seriousness, he prevented me from marrying you two years earlier. I wanted to get married to you at 18."

She looks at me with a slight smile. "What stopped you?"

"The thought of your dad chasing me around the yard with an axe. Besides, my dad also said he didn't want to have a teenage daughter-in-law."

We enjoyed what truly was one of the best meals I've ever eaten. Mary ordered something healthy, as usual, while I ordered a steak. I am not sure if it was the steak, the potatoes, or the company, but it was a fantastic time. After the meal we walked around the city for a little while. The air was cool and the humidity was low. Conditions were so good that we didn't even notice or care about the time. It was very late when we came home and we found both our teenagers asleep in their beds.

When the alarm went off on Monday morning I was surprised to find that I actually did sleep. I didn't sleep much, but four hours was much more than I would've guessed possible. I took my shower before Mary, and then she caught up to me in the kitchen. She gave me a morning kiss and asked, "Today's your big day. Are you excited to go back to court now that the day's here?"

"Excited? No, I don't think what I'm feeling is excitement."

"Silly. It'll be no big deal. Just wait and see."

"I really hope you're right. Judges aren't known for summoning attorneys just to tell them what a great job they're doing."

We said little else because she could see I was just not in the mood for it. We said our goodbyes and I began my drive to the courthouse. When I worked as an assistant district attorney I would sometimes think the drive took hours. This day, even with traffic, the drive took less than 15 minutes. I was hoping for a major traffic calamity, but no such luck.

The courthouse still had that giant sterilized look to it. The gray marble on all four sides looked like it might have just been polished in detergent, and the air smelled crisp but musty. I parked in my old parking lot that now charges the ridiculous amount of ten dollars for a spot. The cost is the same whether you park for five hours or five minutes. I held my hopes that my visit would be short. I walked into the main lobby and preceded through the security areas. The inside was just as sterile as the outside. Gray marble and wooden railings line the building. The place

looks like you could eat off the floor, but those of us who have worked there know better. I found my way over to the elevators to go to floor three. The elevator was crowded with other attorneys, defendants, witnesses, and groupies who just like to hang around the building. When the bell rang, and the elevator stopped on floor three, just about everyone onboard got off. As a group everyone looked around for their designated site, and I found Judge Roe was in courtroom 3F. I remembered that being the biggest courtroom, and it was at the end of the hall. To my surprise, just about everyone in the hallway also headed toward that courtroom.

I held the door for everyone as they filed in and took seats. I could see the inside of the courtroom and a wave of nostalgia rushed over me like a wave over rocks. I took a seat as far in the back as possible. In my earlier days I could've recited facts about the cases on the day's calendar, and I would've recognized many of the people. I noticed that a few of the attorneys, and they can always be distinguished from other people by their eccentricities, took an interest in me. I saw one point my way and whisper to a colleague. I told myself that this was paranoia, but I saw a few others looked my way as well.

Up front there were three tables set up. Attorneys were mingling around the tables with papers and books spread out all over every possible inch. I rarely ever saw three tables set up because there were usually only two sides to each fight. Whatever was on the calendar would take second fiddle to the main case. The sheriff deputy assigned to the courtroom and the judge's calendar clerk came out and took their seats. The deputy, in the customary brown uniform, told the courtroom that the judge was on the way. All people in attendance were expected to stand when the judge entered, and he would start the proceedings with some announcements. I remembered that the announcements will cover such mundane topics as turning off cell phones and pagers, attorneys were to stand when and if the judge calls their case, attorneys were to identify themselves before speaking, and any disrespectful behavior would be dealt with by the deputy. I always wondered if judge's got tired of giving this spiel, but it was a necessary speech and often violated by those not listening.

I was lost in my thoughts when the gavel resounded through the room. The deputy barked out for everyone to stand and called out that the court was now in session. Judge Roe came out from his chambers with his black robe flowing behind him. Judge Roe, a large man with thick gray hair and stern features, sat down. Everyone in the courtroom sat down and the deputy retreated to the corner of the room where he blended in with the paneling. The judge leaned over his desk and whispered to the court clerk. I could not hear the words, but I saw her shake her head.

The judge sat back up and cleared his throat. "Is Mr. Odell DeCarlos present?"

I now understand that the trouble I had getting up was due to my legs not wanting to work. I clumsily stood and answered. "I am, your honor." I heard a few whispers and saw more than a few heads turn my way.

"Mr. DeCarlos, can you come forward please."

"Yes sir." My walking was the same as a drunk man. I couldn't feel my legs, but I was conscious of my arms swinging. I couldn't remember how I ever felt comfortable in a place such as this. I made my way up to the front and stood between the tables. The attorneys seated at each table looked at me with curiosity.

"Mr. DeCarlos, we appreciate your coming today. I'm told you're the man for the job." The judge had serious demeanor, but the look on his face was friendly. He had a slight smile and his eyes showed he was in a light mood.

"I'll do what I can your honor." I felt the need to say something and that was all I could deliver.

"What do you think of our problem?"

This was an odd question. Judges usually don't speak about cases, much less a case they are currently hearing. I looked around at the three tables. The attorneys were all looking at me with a sense of anticipation. "I have no information on this case."

The judge looked puzzled at this statement. "Did you not receive my letter requesting your presence and explaining the situation?"

"I received a letter requesting my presence, but nothing else. I considered it curious, but I just thought I'd have it explained to me when I arrived."

"My apologies, Mr. DeCarlos, for keeping you in the dark. I'm sure it's my fault that you were not given an explanation for the request. We have a delicate matter here. Both sides seem to be making a claim over some property. We also have a third party holding money in escrow for the rightful owner. I've listened to the outline of the case as told by all sides, but I'm not an expert in this area. I'm told I can use someone to come in and try to arbitrate the situation as a special master, and you were recommended. If you don't mind my saying, I was also told you were a bit of a recluse so I might have a hard time getting you here. I'd like for you to hear the arguments and give each side some of your time."

I took a deep breath. "I'll do my best." Just what I need. A final exam in front of witnesses.

Each side takes their turn telling me why they have the best claim to this half acre commercial tract just inside the city. They show me deeds, letters, tax records, and surveys. They tell me of their witnesses and what testimony I could expect in a trial. The third group sits until the end and then they tell me they just want to know where to deliver the money. I begin asking questions and making points. Soon I find myself lost in the moment. I'm no longer in the courtroom but on the side of the road looking at a prized piece of land. I can see the survey lines and I can see the area of dispute. I'm only vaguely aware of the words leaving my mouth and if Judge Roe ever speaks then I don't hear. I ask all the questions I feel I need and then I start a monologue. I explain to the court the ruling that makes the most sense, and how the paperwork should read so that future title examiners will have a resolution. I'm not even sure how long I talk, but when done I feel as if I've run a marathon.

I look around the room and see attorneys sitting with their mouths hanging open. There is only silence for a few seconds before I hear a low chuckle. I turn to see the judge is actually laughing. He catches himself and drinks a sip of water. Then he looks around the courtroom.

"My fellow attorneys, I think we all just got schooled. I hope I can remember half of what I just heard. Mr. DeCarlos, your reputation doesn't do you justice. People say you know your stuff, but I don't think that sufficiently covers it."

I don't know what else to say, so I say thank you. I ask the judge if there's any other service I can provide.

"No, I think that's all. I don't think my brain can handle any more educating. The parties in the case should have more than enough to resolve this problem now."

CONTINUED ON PAGE 56

The F-Bomb—A Tale of Two Lawyers

By Melvin F. Wright Jr.

Have you been faced with unprofessional conduct by a North Carolina lawyer or judge? What did you do about it? What could you have done to correct or at least try to correct the problem?

In North Carolina we have a program called the Professionalism Support Initiative (PSI) which was designed by the Chief Justice's Commission on Professionalism (CJCP) to address conduct that does not violate the Rules of Professional Conduct, but which is offensive and negatively affects our profession. Some professionalism problems arise due to personal or professional issues within a lawyer or judge's private life. Other problems result from depression, other mental impairments, and substance abuse. Oftentimes, however, such things as personality conflicts, a "win at all costs attitude," and not knowing how to disagree without being disagreeable can escalate into unprofessional conduct. The PSI program is a confidential peer intervention program designed to deal with unprofessional conduct.

The following anonymous comments were submitted by a participant in the PSI program:

I am a sole practitioner with a criminal law practice. I received my undergraduate and law degrees from two very prestigious schools outside of North Carolina. After practicing in another state for several years, I moved to North Carolina and have enjoyed my time here.

One of my former clients was contacted by a representative of an attorney seeking certain information. Before answering any questions, the client said that he wanted to contact his lawyer (me). After he explained the matter to me, I advised him that he did not have to make any comment on the matter and I wrote a letter on the client's behalf setting forth this position. Soon after, while I was dealing with a very complex matter, I was caught off-guard by a phone call from the other attorney. My perception was that the attorney was upset with my former client not furnishing the information that this attorney wanted and was upset with me for advising the client not to cooperate. Unfortunately, my conduct in response was not very civil and was very unprofessional. After listening to his interpretation of the law, which I disagreed with, I interrupted this attorney and told him to "Go f--- yourself." The attorney was shocked and upset but kept arguing with my position as I dropped another "F-bomb."

The offended attorney contacted the CJCP with a PSI complaint. A representative from the CJCP contacted me and suggested a confidential meeting to discuss my conduct towards the other attorney. Although I was worried about the matter, I agreed to meet with him, and I am glad I did.

The meeting started with a handshake and the exchange of personal information. It was apparent that the CJCP representative was not interested in causing me any new problems, but wanted to help me deal with an existing problem. I wanted to know more about the PSI program and the CJCP, because there was no such professionalism commission in the state where I previously practiced.

During our meeting, I was asked to explain my conduct and what had provoked me to the point where I would say the things I did to the other attorney. I was defensive and talked about the strength of my legal arguments; however, I admitted that I would not have used that type of language in front of a judge.

We discussed the informality of our society and the types of conduct we hear and see in the media everyday. But this was a legal matter, and what became clear very quickly was how distracting my use of profanity was from what should have been a sharp discussion of the investigation and the exercise of constitutional rights. When I asked the CJCP representative what he thought I should do, he said that I should write a letter of apology to the other attorney.

I wrote the letter, and the offended attorney was very appreciative of and receptive to my apology. The attorney indicated that he would like to get together in the future to talk. I know we will discuss the difference between the professionalism effort in North Carolina and the former state where we both practiced.

To have someone take me to lunch to talk about the importance of professionalism was a great way to deal with this matter. I will take more care in the future in order to ensure I am respectful of lawyers, judges, and clients. As a result of the PSI intervention, I have met new lawyers and hope that my relationship with them will lead to friendships, both personal and professional.

PSI is one avenue in which to address unprofessional conduct among lawyers and judges and has had a successful outcome in almost every case where the CJCP has been involved. In the above experience, the attorney realized his behavior was unprofessional and apologized for it. The offended attorney was appreciative of this apology, thereby opening the lines of communication to resolve the original legal issue between them.

Most lawyers are reasonable people with their own human flaws and issues. We all have different personalities, biases, backgrounds, and opinions. Sometimes, those differences can cause us to act in a way in which we generally do not act, and which may be characterized as unprofessional. ■

If you are aware of unprofessional conduct by a lawyer or judge and you think a confidential intervention may help, please contact Mel Wright at the NC Chief Justice's Commission on Professionalism at (919) 890-1455 or email to Melvin.F.Wright@nccourts.org.

IOLTA Faces Difficult Economic Times

Income

Final information on IOLTA income earned in 2009 will not be received and entered until January 31, 2010; however, we know that we were hard hit by the economic downturn which has seen unprecedented low interest rates being paid on lower principal balances in IOLTA accounts. Following a record-breaking year for income in 2008 (surpassing $5 million) fueled by moving to a mandatory program, we had income declines of over 50% for every month in 2009.

Grants

IOLTA board meetings in September and December 2009 were very difficult as we struggled to make good decisions regarding grant and reserve funds to provide much-needed assistance to legal aid organizations not only in 2010, but also into the next few years. Because we kept 2009 grants flat while moving our income increase to reserves, our reserve fund held $2.67 million. However, looking at predictions that interest rates will not increase before late 2010, the trustees determined that they would need significant funds from the reserve to make both 2010 and 2011 grants. Therefore, they decreased the number of 2010 grants by deciding not to make grants to new organizations or for new programs. They also decided not to make 2010 grants to a number of organizations that receive funds for administration of justice programs including summer internships to law schools. Hopefully, increased income in the future will allow those organizations to again receive grants. At the December grant-making meeting, the board determined that they could take $1 million (or approximately 37%) from the reserve fund and made just over $3 million in grants for 2010 (compared to $4.1 million in 2009). Grants to legal aid programs were decreased by approximately 20%.

State Funds

During the 2008 calendar year, in addition to its own funds, NC IOLTA administered over $6.4 million in state funding for legal aid on behalf of the NC State Bar. Through the third quarter of 2009, NC IOLTA had administered $4.8 million in state funding.

The legal aid programs worked hard to sustain the state funding for legal aid which is even more necessary in the economic downturn. The Equal Access to Justice Commission, the NCBA, and the Equal Justice Alliance pressed for increased state funding to meet the increased needs. Unfortunately, appropriated funds for legal aid were decreased by 25% for 2009-2011. Supporters will be working to restore and increase legal aid funding for the future.

Celebrating NC IOLTA's History

NC IOLTA celebrated its 25th anniversary in 2009. To honor the occasion, the NC State Bar *Journal* published a three-part series of articles on NC IOLTA. All the articles can be accessed at the State Bar's website: www.ncbar.com/IOLTA_articles.pdf. An article focusing on the importance of our relationship with North Carolina banks over the years was published in the NC Bankers Association publication. We are now placing shorter articles with a local focus in local bar publications.

FDIC Coverage of IOLTA accounts

Following an intensive comment period regarding the rules of the FDIC Temporary Liquidity Guarantee Program during fall 2008, it was decided that all funds in an IOLTA account, regardless of amount, would be insured in full by the FDIC and backed by the full faith and credit of the United States government (unless the bank opted out of the program with posted notices). This Transaction Account Guarantee program (TAG) coverage has been extended through June 30, 2010. IOLTA accounts held in institutions that opt out of the TAG program are insured up to $250,000 per owner (i.e., client). A list of banks opting out of the program is now accessible through the FDIC website. Information regarding FDIC coverage of trust accounts is posted on the NC State Bar website.

Considering Comparability

Over the last several years, many IOLTA programs in other jurisdictions have passed a comparability requirement, which requires lawyers to maintain their IOLTA accounts at banks that pay rates on those accounts that are comparable to what the banks pay on other, similar accounts. As of December, when the South Carolina Supreme Court approved a revision to its IOLTA rules, 30 of 52 jurisdictions have adopted comparability. NC State Bar Past-President John McMillan made exploring comparability for NC IOLTA a goal of his presidency, and the concept is supported by NCBA leaders and the NC Equal Access to Justice Commission.

Having seen other states increase IOLTA income through comparability, the NC IOLTA trustees felt it was their duty to explore whether such a requirement would increase IOLTA income in North Carolina—particularly since a majority of NC IOLTA accounts are held at multi-state banks that are already operating in comparability jurisdictions. NC IOLTA trustees engaged a consultant whose analysis of the program determined that, under comparability, significant increases could be projected for the future and recommended that North Carolina immediately begin the process of moving to comparability so it will be in place when the rate climate improves. This report was presented to the IOLTA Trustees and the NC State Bar during the State Bar meeting in April 2009.

IOLTA and State Bar staff and leadership established a dialogue with the NC Bankers Association and drafted a proposed IOLTA rule revision requiring comparability that was approved for publication for comment by the NC State Bar Council at its October 2009 meeting. The IOLTA Board recommended to the NC State Bar

CONTINUED ON NEXT PAGE

You've Been Served

By Suzanne Lever

The protection of client confidences is one of the most significant responsibilities imposed on a lawyer. Rule 1.6(a) of the Rules of Professional Conduct provides that a lawyer shall not reveal information acquired during the professional relationship with a client unless (1) the client gives informed consent; (2) the disclosure is impliedly authorized; or (3) one of the exceptions set out in Rule 1.6(b) applies. The confidentiality rule applies not only to matters communicated in confidence by the client, but also to all information acquired during the representation, whatever its source.

One of the exceptions set out in Rule 1.6(b) provides that a lawyer may reveal confidential information to comply with "the law or court order." *See* Rule 1.6(b)(1). Because compliance with a subpoena is required by law, a lawyer who is served with a subpoena may reveal information that would otherwise be protected under Rule 1.6(a). However, the lawyer continues to have an obligation to protect privileged information. Although the concepts of confidentiality and attorney-client privilege are often used interchangeably, privilege applies to a much narrower category of client information. The lawyer must assert the privilege on behalf of the client and must make all nonfrivolous arguments that the information is protected by the attorney-client privilege or other applicable law. *See* Comment [14] to Rule 1.6. The lawyer's professional obligation is to resist disclosure of privileged information until a court has determined that disclosure is in fact required by law. In the event the court orders disclosure, the lawyer must consult with the client about the possibility of appeal. Unless review is sought, Rule 1.6(b)(1) permits the lawyer to comply with the court's order.

A lawyer who is served with a subpoena should first determine whether the client consents to the disclosure. The lawyer should discuss the subpoena and its ramifications with the client. If the client has no objection, the lawyer may disclose all of the information requested by the subpoena.

If the lawyer is unable to obtain the client's consent, to comply with the law the lawyer may produce anything that is not privileged. As to information that the lawyer believes is privileged, the lawyer should make a motion to quash, make a motion to modify, or specifically object to the production of the privileged information. The lawyer should err on the side of objecting if the lawyer is unsure whether certain information is privileged. In addition, the lawyer should only produce what is necessary to comply with the subpoena. The lawyer should inform the client that the lawyer may be obligated to reveal information if required to do so by court order.

After a ruling on the privilege issue, the lawyer may produce information required by the court's order, unless the client requests an appeal. The disclosure should again be no greater than necessary to comply with the order. The lawyer can still refuse to disclose the information without violating the ethics rules because Rule 1.6(b) provides that the lawyer "may reveal" the protected information. However, the lawyer may face contempt charges for disobeying the court's order.

If the lawyer no longer represents the client, the lawyer does not have to expend his own money to appeal, etc., but the lawyer does have to assert the privilege. However, once a court order is entered, the lawyer is not required to file an appeal. If the client is represented by a new lawyer, the subpoenaed lawyer should notify the new lawyer of the need to discuss filing appropriate motions or an appeal with the client.

The lawyer should also contact his malpractice insurance carrier. Some carriers choose to have a lawyer present at depositions or hearings to make sure an insured does not inadvertently disclose information unrelated to the deposition matters or otherwise. Or, the lawyer may want to hire his own lawyer to advise him about what materials are privileged and should, therefore, not be produced in response to a subpoena, or to represent him at a deposition or hearing. ■

Suzanne Lever is assistant ethics counsel for the North Carolina State Bar.

Bank News

There are now 100 banks in North Carolina that have IOLTA accounts. A current Bank List is kept updated on the NC State Bar website. Banks that waive service charges or pay a higher yield on IOLTA accounts are highlighted on the list.

New Banks. We are pleased to welcome the following banks that have opened NC IOLTA accounts since the last publication of the *Journal*:

American National Bank, Yanceyville : : Pisgah Community Bank, Asheville

IOLTA Update (cont.)

Council that it adopt the comparability requirement in the proposed rule. After being published for comment, it was adopted by the council at the January meeting and was forwarded to the NC Supreme Court for approval. The Court approved the rule on January 28, 2010. ■

Profiles in Specialization—Stewart Poisson

An Interview by Denise Mullen, Assistant Director of Legal Specialization

I recently had an opportunity to talk with Stewart Poisson, a board certified specialist practicing in Wadesboro and Wilmington. Stewart received both her undergraduate and law degrees from the University of North Carolina at Chapel Hill. Following graduation, she joined her father, Fred Poisson Jr., and grandfather, Fred Poisson Sr., in practice. Stewart focused her practice on workers' compensation law and personal injury law, planning to sit for the certification exam in workers' compensation when she became eligible. She achieved that goal in November 2009, following in her father's footsteps—he is also a specialist in workers' compensation law. Below are Stewart's comments about the specialization program and the impact she anticipates it will have on her career.

Stewart Poisson

Q: Why did you pursue certification?

My father (Fred Poisson Jr.) encouraged me to pursue certification as soon as I was eligible. He serves as a State Bar Councilor and has always been a big supporter of the certification program.

Q: How did you prepare for the examination?

As I have been teased, I over-prepared, but that's my nature. I read Chapter 97 of the General Statutes, I used the study guide information online, and I read the Industrial Commission Rules and Mediated Settlement Rules. I talked to other board certified specialists and, based on their suggestions, I read the appellate case law for the previous three years. I devoted the better part of a three-day weekend to reading and studying.

Q: Was the certification process valuable to you in any way?

When I applied, I had been practicing just five years. Part of the application process involves gathering references and listing some basic information about your involvement in the practice area. I was really proud to look back over the five-year period and see what I had accomplished. I was glad to see that my success rate was good overall. I also really appreciated the opportunity to seek references who would recommend me for this program based on my work history and ability, not my father's. We collaborate a lot in our work, but for this I needed to reach out on my own.

Q: How do you envision certification being helpful to your practice?

I know that I look young and am relatively young in my profession, so I imagine that this will help instill my clients with additional confidence in my abilities. I have had a lot of experience, and I know the practice area well. It will be really nice to have gone through this vetting process, to have this distinction that shows my dedication to this practice area.

Q: What have your clients, staff, and colleagues said about your certification?

Many of my clients were aware that I was taking an exam, so they have been

really excited for me. The staff has been so supportive and very complimentary. I heard from others that my father was beaming!

Q: How do you think your certification will benefit your clients?

The studying that I did for the exam has already been a benefit to my clients. On a daily basis, in a busy practice, you don't have an opportunity to do a really comprehensive review of the law. Making the time for this review was a great refresher for me, and I ran across a few special cases that had direct implications for matters I was currently handling. I also think the certification will give clients more confidence in my work and help with building trust and long-term relationships.

Q: How do you stay current in your field?

I read *Lawyers Weekly*, appellate court decisions, and my practice area listservs. The NC Advocates for Justice offer really great continuing legal education courses, including a particularly good one on workplace torts each year in December.

Q: Is certification important in your practice area?

It is. We have very complex options for handling cases. We have to be familiar with the law to get our clients the best result. Dabbling in workers' compensation law can be dangerous. The certification program identifies those who focus on this area, have passed an examination, and really know this area of the law.

Q: How does specialization benefit the public?

I think it is most helpful in educating the public. I think it must be quite daunting to have to choose an attorney, particularly if you don't know someone in the legal profession. It is very helpful to have an objective process to vet attorneys that clients can use with confidence.

Q: Are there other areas in which you think certification could be offered?

I would love to see certification offered in personal injury law. I know that it would be a very difficult screening process to create, given the variety of factors that you could consider as qualifying someone in this practice area to take a certification exam, but think it would be a real benefit to the public. I would also be interested in seeing something for civil litigation, perhaps a specialization exam that covers the rules of evidence and civil procedure.

Q: What would you say to encourage other lawyers to pursue certification?

I would point out that taking three days to study is not a huge time commitment compared to the span of your career. You'll be amazed at all that you know and you will also see things that you need to review. If you're dedicated to your practice area, you want to continue improving. There are many personal and client benefits to becoming a board certified specialist. ■

For more information on the State Bar's specialization program, please visit us on the web at www.nclawspecialists.gov.

Congratulations to the Newest Board Certified Specialists

Criminal Law
Scott Casey, Boone (State)
Jeffrey Cutler, Wendell (State)
J. Michael Edney, Hendersonville (State)
Walter Jenkins, Biscoe (State)
James Lupton, Beaufort (State)
Anand Ramaswamy, Greensboro (Federal/State)
Robert Trenkle, Durham (Federal/State)
Haywood White, Wilmington (Federal/State)

Elder Law
Kathryn C. DeAngelo, Surfside Beach
Mark E. Edwards, Nashville
Laurence S. Graham, Greenville
Larry S. Hartley, Asheville
Diana A. Johnston, Hendersonville
Caroline T. Knox, Hendersonville
Benjamin B. Liipfert III, Winston-Salem
Robert A. Mason, Asheboro
Katherine A. Mewhinney, Winston-Salem
Dennis J. Toman, Greensboro

Estate Planning
Eldridge Dodson, Wilmington
Timothy Jones, Raleigh
Danica Little, Charlotte
Patrick Newton, Hendersonville

Family Law
Melissa Averett, Chapel Hill
Loretta Biggs, Winston-Salem
Paul DeJesse Jr., Charlotte
Brian King, Rutherfordton
Jeffrey Marshall, Raleigh
Jennifer Moore, Asheville
Steve Ockerman, Charlotte
Allison Pauls, Charlotte
Michelle Reingold, Winston-Salem
Michael Romano, Charlotte
Leigh Sellers, Charlotte
Jennifer Smith, Chapel Hill

Immigration Law
Victoria Block, New Bern

Real Property Law
J.C. Hearne, Wilmington (Residential)
Gregory Kunkleman, Charlotte (Residential)
Robert Lawson, Raleigh (Commercial)
Robbie Parker, Wilmington (Residential)
Carolyn Snipes, Asheville (Residential)
Garrett Walker, Greensboro (Commercial)
Amy Zeko, Wilmington (Residential)

Social Security
Monica Savidge, Wilmington

Workers' Compensation
Jill Calvert, Charlotte
Scott Galiger, Greensboro
Barry Jennings, Durham
Rufus Permar III, Greensboro
Elizabeth Stewart Poisson, Wilmington
Daniel Pope, Raleigh
Robert Starnes, Charlotte
Louis Waple, Charlotte

These lawyers were certified by the North Carolina State Bar Board of Legal Specialization on November 12, 2009.

How the Pain Melted Away

By a LAP Volunteer

This article is presented anonymously in the spirit of focusing on issues of healing, not personalities. If you would like to communicate with the author, please e-mail Don Carroll at nclap@bellsouth.net.

I am happy to be a part of how the Lawyer Assistance Program (LAP) provides confidential assistance to lawyers. The LAP program is currently working with over 500 lawyers, self-referred and referred by family or colleagues, making up nearly 98% of its workload with a mere 2% coming from grievance-based referral.

My story is one of overcoming mental health and addiction challenges through the course of my adult life. My hope is that my strategies of addressing mental health issues, coupled with addiction, while at the same time figuring out how to be happy as a practicing lawyer, will elucidate the interplay of these dual struggles.

Forty years ago in the turmoil of the spring of 1970,[1] I ingested way too many hallucinogenic drugs and was admitted to Yale Psychiatric Institute for four months to overcome what was superficially a drug-induced break from reality, with messianic visions of my duty to save the world. After intensive hard work in therapy dissecting the environmental factors of my childhood which led to my breakdown, I was admitted to law school, choosing to follow my deceased father's profession. By graduation in 1975, I had succumbed to drinking a breakfast of grapefruit juice and vodka at a local bar, dabbling at school, and drinking through the night with liars' dice players—local construction workers and alcoholic faculty members who found "refuge" in our favorite bar. In therapy, a well-intentioned therapist recommended that I eat hard-boiled eggs with my breakfast drink and seek out locations where there was natural lithium in the water to rein in my manic depression, now known as bipolar disorder, which she assumed I suffered from. I had no concrete plans of what to do. I had gone from first in my first-year class at law school to being in the top two-thirds—not a good resume headline grabber.

After graduation, I packed my belongings and boarded a train to go back to my home town, thinking naively that my father's old friends might give me a job. The rigors of law school and having no plans for my future triggered a good bout of depression that I once again self-medicated with alcohol. Somehow, in short order I managed being admitted to practice in my home state and California. I landed a poorly remunerated clerkship at a large metropolitan law firm, struggling to take myself seriously as a lawyer and continuing to try to feel better with alcohol and the drug *de jour*, cocaine, prevalent in the professional community at the time. Shocked at the sexual harassment at the law firm, associates' behavior sanctioned by partners of priming female staff with alcohol, I left private practice after just a year to work at the legislative drafting office, where I continued to be dismayed at the amount of alcohol consumed by legislators and staff day-in-and-out and through the night in the midst of long legislative sessions.

Searching for community outside my drinking and drug-using buddies, I started exercising, learning to go on long bike rides and returning to my Girl Scout camp days of hiking. I was healthier, having quit smoking, not drinking as much, and not as mired in depression, but I was unfulfilled in my work as a lawyer at the legislature. I began volunteer work with a Quaker social justice and peace organization, the American Friends Service Committee (AFSC). This reignited an interest in improving the criminal justice system and I began helping organize protests condemning violence against women. Determined to put my advocacy skills to use, I went to work for the AFSC in an organizing position at a very low salary and opened my own law practice. Yet, I still had many days when I was stuck in bed, unhappy and hiding, and overeating. A coworker at AFSC suggested to me that I might be interested in coming to an introductory lecture about a peer counseling process as an alternative to therapy.

What began was a 20-year process of learning, and later teaching, the techniques of exchanging listening time—allowing myself and my listening partner to feel the depths of painful feelings while telling life stories repeatedly until the pain stored up is melted away and self esteem and clarity about the future emerges. Listening and feeling sessions can occur in as little as five minutes with two partners in a large group with equal time for all, or up to 60 minutes each with two partners who get to know each other well. The basic premise is that, with the discharge of painful feelings, one can rebuild self esteem, notice the inherent loving connection between humans, and bring to each new situation a fresh perspective, using intelligence to live a fruitful life. Much like 12-step programs, each day requires a commitment to start over, to stay connected with one's listening partners, and to attend periodic meetings of support groups. Support groups based upon identity—be it women, men, people of color, or people raised in poverty—give participants an opportunity to have the safety of a common identity as each heals from a painful past and articulates goals for the future. Without the recognition and discharge of painful feelings, I had remained stuck in playing out destructive patterns and reacting, rather than being proactive in taking charge of my life as a woman, as an adult child of an alcoholic, as a mental health system survivor, and as a lawyer.

When presented with an opportunity to

move with the AFSC to North Carolina in 1981, I looked around at what I called the "witchy" divorce lawyers in my building and decided I didn't want to follow that path and made the move to what has become my home state. It took me another few bouts of bipolar-type behavior—grandiose thinking followed by depression—to really grasp what my life might look like if I decided to take myself seriously as a lawyer and at the same time kept a commitment to be happy. I persisted in telling my stories and letting go of my painful feelings—living with alcoholic parents with attention deficit disorder, dealing with my dad's early death, my brother getting killed in an auto wreck, my rape, my abortion, my feelings about sexism, and my zany mom—in weekly sessions with my listening partners and many weekend workshops. I left the AFSC and started my own practice in the Triangle. Inch-by-inch over the last 27 years, mindful of addictive behaviors, I have navigated my way up and out of depression to a good life, full of good friends, proud of my family, and happy and respected as an attorney/mediator.

For me, good mental health has not included psychiatric drugs, but rather a good blend of peer counseling, regular exercise, spiritual time, close connections with friends and family, and a realistic view of what I enjoy as a lawyer and what it makes sense for me to avoid. Recent research shows that taking antidepressants alone without regular connection to a support group or interactive therapy is not sufficient to help folks suffering from depression to reach their potential. At different stages of my breakdowns, I have heard the labels psychotic, manic depressive, bipolar, and adult attention deficit. What I learned in the mental hospital years ago is that there are no crazy people, but rather people with painful experiences and crazy behaviors who are acting out to look for help. Good therapists can be good resources and psychiatric drugs have their place. Yet for me, self help peer counseling enabled me to feel the pain, and then, with a pain-free intelligence, develop my own strategies for getting out of the destructive patterns.

With respect to physical activity, the endorphins released from running, biking, lifting, hiking, swimming, or any other activity contribute to a sense of well-being and are obvious stress relievers—pounding out anger, pushing against fears, and pulsing rhythms of "can-do-it-ness." My heart is healthy, and I have so far met my commitment not to follow my dad's footsteps of dying from heart disease at age 50. I do fight a tendency to do physical activity in isolation and find friends and partners with whom to share this time.

To feed my spirit, time in nature, a regular yoga practice, and other meditative time have worked well for me. For others, I am sure that membership and involvement in a religious community serves a similar purpose. A connection with the positive energy of the universe, reaching for a peaceful state of being, and a discipline of noticing a benign reality are important for any human, whether reached in traditional prayer, eastern yogic disciplines, or even virtual reality blogs.

My open personality and skills developed in my peer counseling work have made it easy for me to get close to others. I have relationships with lawyers, who in addition to being opposing counsel or co-counsel are deep, close, personal friends who have turned to me with their stories of divorce, death, difficulties with children, and feelings of betrayal by other colleagues. As life's challenges have continued to cross my path—illnesses of friends and parents, my daughter's struggles with employment—I have a good circle of close friends to support me as I support them in their life challenges.

As a lawyer, it has been easier for me to work for myself—I can set my own income goals and spend the time taking care of myself so that when I am working I am really there. I have had days and nights of working really hard, but other days when I'm in the woods and at the gym and only in the office for a short while. I listen to other lawyers talk about being too busy, worried about business slowing down in this economic crunch, or worried about meeting overhead. We all know lawyers who drink too much, overeat, engage in sexual acting out, or ignore perpetually the pile of undone work. Our lives as lawyers, solving other peoples' problems, sets us up for a barrage of self-critical patterns as people expect us to work miracles to get them out of problems that they have created or been subjected to. Many of us have rescue personalities so that we work really hard to help others by nature. Yet the justice system we rely on cannot deliver miracles even at its best, and is mired in outdated procedures trying to solve 21st century problems. These dynamics contribute to the stress that lawyers internalize every day in their jobs. It's hard work to be a lawyer, and the satisfaction of a job well done and money alone does not alleviate the stress.

I am hopeful that by telling my story someone in denial about addiction's interplay with depression or ADD or being stressed to the max will reset priorities, find a support group, and pick up the phone to call the LAP for help with depression, substance abuse, or mental health issues. The LAP makes sure lawyers find good therapists used to helping lawyers (not like the one I had) and focuses much effort on a confidential peer support system that gives listening support like the kind that has been so helpful to me.

Mel Wright's work for the Chief Justice's Committee on Professionalism has helped remind us of the need to exhibit respectful attitudes towards ourselves, our colleagues and our clients. Yet many of us have not found the balance of self-care and work that makes for contentedness and resilience necessary to arrive at work and leave every day satisfied with our lives as lawyers. I was recently asked to speak at the annual meeting of my field of practice, and I occupy positions of responsibility statewide helping lawyers. After years of self-care work and direction, I have taken myself seriously as a lawyer and am pleased with the results. Coming out as a mental health system survivor, and one who has struggled with addiction, is still scary, but there is a path to wellness in these difficult times. ■

The North Carolina Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a North Carolina lawyer, judge, or law student and would like more information, go to www.nclap.org or call toll-free: Don Carroll (for Charlotte and areas West) at 1-800-720-7257, Towanda Garner (in the Piedmont area) at 1-877-570-0991, or Ed Ward (for Raleigh and down East) at 1-877-627-3743. Don is the author of "A Lawyer's Guide to Healing" published by Hazelden. If you have a personal story that you would like to submit for consideration for publication in the LAP column, please forward it to Don Carroll at nclap@bellsouth.net.

Endnote

1. Shootings at Kent State, Vietnam War protests, student movement protests, and the launching of Earth Day.

Bruno's Top Tips for Tip Top Trust Accounting

BY BRUNO DEMOLLI

FDIC Protection for Client Funds in Your Trust Account

During this economic downturn, the FDIC (Federal Deposit Insurance Corporation) has closed a number of banks causing lawyers some concern regarding the protection of client funds in their trust accounts. FDIC coverage has also gone through a number of changes during the recovery. Here is a refresher and update on FDIC coverage.

Basic Coverage

The basic rule regarding FDIC coverage is that each client's funds deposited in a trust account will be insured by the FDIC (up to the insurance limit, which is currently $250,000) provided the account satisfies the FDIC disclosure requirements. Remember that the client's insurance limit includes *all* of the client's funds held at that bank; if a client holds funds in a different account (e.g., the client's own account or different lawyer's trust account) at the same bank in addition to the funds in the lawyer's trust account, they will be included when determining total coverage.

Requirements for Coverage

There are two disclosure requirements: (1) the fiduciary nature of the account must be disclosed in the bank's records, and (2) the name and ownership interest of each owner must be ascertainable from the deposit account records of the insured bank or from records maintained by the fiduciary. If you are complying with the trust accounting and record keeping requirements in Rule 1.15 of the Rules of Professional Conduct, you have already satisfied both of the FDIC disclosure requirements.

Changes to Coverage

Following an intensive comment period regarding the rules of the FDIC Temporary Liquidity Guarantee Program during fall 2008, it was decided that all funds in an IOLTA account, regardless of size, would be insured in full by the FDIC and backed by the full faith and credit of the United States government unless the bank opts out of the program with posted notices. This Transaction Account Guarantee Program (TAG) coverage has been extended through June 30, 2010.

However, *quite a few banks have now opted out of the program*, including a number of large banks operating in North Carolina such as Bank of America, BB&T, Suntrust, and Wachovia. A list of banks opting out of the program is now available on the FDIC website: www.fdic.gov/regulations/resources/TLGP/optout.html. Please note that banks are listed there by the state in which they are headquartered. IOLTA accounts held in institutions that opt out of the TAG program revert to the basic coverage and are, therefore, insured up to $250,000 per owner (i.e. client). ■

Mental Health Court (cont.)

organization providing professional, accredited case management services is essential. Other agencies such as our jail, our pre-trial release program, our mental health clubhouse, our local NAMI chapter, our police departments and their social workers, vocational rehab, Section 8 housing, our businesses local and national who donate incentives, the Town of Chapel Hill and its Public Housing Department, and the University of North Carolina and UNC Hospital, to mention a few, are all invaluable partners in the success of the participants in CRC.

For our district, once a month court sessions in each location are adequate. Many of the participants have challenges with transportation so we set the court location based upon where it is easiest for them to attend. What matters most is the commitment of the participants and availability of services.

If we can help with other information about mental health court, don't hesitate to contact us. Also GAINS Center is an exceptional resource for information on what is occurring nationally with this effort. Our program administrator is Marie Lamoureaux and her contact information is provided below.

marie.lamoureaux@ nccourts.org
Ms. Marie Lamoureaux
Programs & Special Projects Manager
Office of the Chief District Judge
PO Box 1088
Hillsborough, NC 27278
www.gainscenter.samhsa.gov/html/resources/presentations.asp ■

I would like to gratefully acknowledge Dr. Diana Perkins, Jim Van Hecke, the late Jesse Basnight, Tom Maynard, Judy Truitt, Dr. Nancy Johnston, Dr. Earnie Larsen, Dr. Terrence Real, Caroline Ginley, Jim White, D.C. Rhyne, Senga Carroll, Jeffrey Demagistris, Tom Velivil, Lauren Dickerson, Karen Murphy, Fran Muse, Public Defender James Williams & staff, Judge Carl Fox, District Attorney Jim Woodall & staff, Community Corrections JDM Tommy Perry & staff, Judge Beverly Scarlett, Congressman David Price, Representative Verla Insko, Sheriff Lindy Pendergrass, Sheriff Richard Webster, Judge M. Patricia DeVine, Matt Sullivan, Bill Meade, Professor Dan Pollitt, Dr. Virginia Aldige, Dr. Marlee Gurrera, and many others. Mostly thanks to Kurt for reminding us why this is important. Without all of you we would not have this court or this opportunity to serve those who need our empathy, help, and love.

Featured Artist—Wade Smith

Wade Smith has been one of North Carolina's best known and most acclaimed lawyers for nearly 50 years. His trials are recounted in books, magazines, and journals. A renowned story teller, Wade insists that within each case there is a compelling story waiting to be told. In seminars and bar meetings Wade has shared the art of story telling. His cases offer a fine collection of North Carolina courtroom lore. In 1979, Wade served as counsel to Dr. Jeffrey McDonald in the much studied and discussed Green Beret Murder Case. Most recently he was lead counsel for Collin Finnerty, one of three young men accused in the Duke Lacrosse Case.

To commemorate the body of work Wade has completed, the North Carolina Bar Association established in the spring of 2008 the annual Wade M. Smith award "for a criminal defense attorney who exemplifies the highest ideals of the profession." Wade is a recipient of the North Carolina Bar Association's H. Brent McKnight Renaissance Lawyer Award, was honored by Best Lawyers in America in recognition of being chosen 25 years in succession for inclusion in the publication, Best Lawyers in America, and was named by *Business North Carolina Magazine* as North Carolina's number one criminal lawyer. This selection was based on a vote by his fellow lawyers. He is now a member of *Business North Carolina's* "Legal Elite" Hall of Fame.

Rest Haven Light

Wade was born in 1937 in Albemarle, North Carolina. His mother and father were textile workers, having barely survived the Great Depression. Wade and his brother, Roger, were raised in a mill village called New Town. The family attended North Albemarle Baptist Church. Wade recalls that they went to church "every single time the doors opened." In high school, Wade was an All American football player with many opportunities to play on college football scholarships. But he chose, instead, an academic scholarship, The Morehead, at the University of North Carolina.

At UNC he excelled in academics and athletics, serving as one of the captains of the football team and winning many honors as an athlete. He was also awarded membership in the university's highest honorary, The Golden Fleece. Wade has maintained his connection with the university, serving as president of the Alumni Association in 1985. In 1989, the university awarded him its Distinguished Service Medal.

After completing his undergraduate work and earning an AB in English, Wade attended the University of North Carolina School of Law, graduating in 1963. From 1963 to 1964 he was clerk to North Carolina Supreme Court Justice Carlisle W. Higgins. After his year as a clerk, Wade joined friend and fellow law clerk, J. Harold Tharrington, to found the law firm Tharrington Smith. Justice Higgins was a mentor to Wade throughout his formative years as a lawyer and, after finishing his years on the North Carolina Supreme Court, he joined Tharrington Smith, remaining with the firm until his death in 1980. Wade counts among his most important mentors acclaimed defense lawyers, Robert L. McMillan Jr., Carl Churchill, and Joseph Cheshire V. But Wade says he has learned the most from his brother, Roger W. Smith, a renowned lawyer in his own right.

From 1964 to 1966 Wade was a prosecutor in Wake County Superior Court. He then began his work as a trial lawyer. During the ensuing years Wade has tried dozens of cases before juries in federal and state courts across North Carolina and other states.

In 1973 Wade was elected to the North Carolina House of Representatives and was reelected in 1975. In 1977 he retired from politics to devote his time to the practice of law. In 1985 he was elected to a one year term as chair of the North Carolina Democratic Party.

Wade has been chosen for membership in many associations recognizing excellence in trial work. He is a fellow of the American College of Trial Lawyers, a fellow of the American Board of Criminal Lawyers, and a fellow of the International Society of Barristers. He served as president of the Wake County Bar Association in 1988. In 1998 he was presented the Joseph Branch Professionalism

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of the State Bar building. The artwork enhances the exterior of the building and provides visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Mahler Fine Art, the artists' representative, for arranging this loan program. The Mahler is a full service fine art gallery representing national, regional, and North Carolina artists, and provides residential and commercial consulting. The Mahler, along with its sister gallery, The Collectors Gallery, are located in downtown Raleigh. Readers who want to know more about an artist may contact owners, Rory Parnell and Megg Rader at (919) 896.7503 or info@themahlerfineart.com

Award by the Wake County Bar Association. He has been listed in Best Lawyers in America since its inception.

In 2006, the North Carolina General Assembly established The North Carolina Innocence Inquiry Commission. The purpose of the commission is to evaluate actual innocence claims made by people convicted of criminal acts in North Carolina. Wade was appointed by the North Carolina chief justice to serve as one of the eight commissioners serving on this new North Carolina Commission.

Wade's work crosses many spectra, both civil and criminal. He has represented people and businesses great and small. Wade insists that there are no small cases. All cases which concern people are important to them, and therefore to him. He often represents businesses and business people in crisis during federal and state criminal investigations and trials. He has represented people from every walk of life and every kind of employment. He has worked in the areas of tax fraud, Medicaid and Medicare fraud, health care fraud, environmental crimes, and financial crimes.

Wade and his wife Ann have two children, Karen Linehan and Robyn Yigit Smith. They have four grandchildren—two girls, Kelsey Linehan and Dylan Linehan, and two boys, Kenan Wade Yigit and Aslan Asa Byrum Yigit. ■

In Memoriam

Eugene C. Brooks III
Durham

John E. Clark
Wilson

Edgar S. Dameron Jr.
Burlington

James T. Davis
Forest City

Ronald W. Davis
Kempner, TX

Bruce A. Elmore
Asheville

Carlton E. Fellers
Raleigh

Cyrus C. Frazier Jr.
Greensboro

Doris C. Gamblin
Lexington

Robert T. Gash
Brevard

Charles T. Hagan Jr.
Greensboro

David H. Henderson
Charlotte

William H. Holdford
Wilson

Edward E. Hollowell
Cary

Gilmer A. Jones Jr.
Wake Forest

Jimmie R. Keel
Tarboro

Wiley L. Lane Jr.
Wilson

Frank G. Laprade Jr.
Mount Airy

Edgar Love III
Charlotte

Stephen L. Lovekin
Hickory

Willis E. Lowe
High Point

James P. McDermott
Colfax

William A. McFarland Sr.
Tryon

Dickson McLean Jr.
Lumberton

Elmer R. Oettinger Jr.
Chapel Hill

John H. Redding
Asheboro

Carol M. Schiller
Raleigh

Hubert E. Seymour Jr.
Greensboro

Thomas K. Spence
Charlotte

James R. Turner
Greensboro

Perry N. Walker
Greensboro

Norman E. Williams
Durham

Maurice Winger Jr.
Asheville

Kenneth Wooten Jr.
Raleigh

The following story was written by Wade Smith and explains how he started painting.

The Red Eyed Rabbit

One brisk autumn morning in the long ago, my mother took me by the hand and we walked together to Central Elementary School in Albemarle. This was a journey of about a mile. Normally I would have devoted myself fully to the task of stepping on each crack in the sidewalk. But, on this day, I was in no mood to step on the cracks. This was my first day of school. I was filled with a strong sense of foreboding. My family lived in a mill village called New Town. It was hard times for almost everyone in those days of the war. There was no running water in our village. The houses were cold in winter and hot in summer. There were frequent blackouts designed to darken the villages to hide them from possible enemy planes. We hung blankets over the windows so that we could light a candle and huddle together as a family. Thankfully the enemy planes never came.

Everyone in the village of New Town worked at the Wiscassett Hosiery Mill. My Dad was a knitter of stockings for elegant and fashionable ladies and we imagined them wearing these beautiful stockings in the impossibly far-away city of New York. The mill whistle blew at eight each morning to signal the time to begin work. The mill had long ago given the land for a tiny wooden Baptist church which nestled at the edge of our village, and we attended every service no matter the purpose of the meeting. Life was good in New Town. My brother, Roger, and I grew up in the warm embrace of a generation of people who left the farms and came to town to work in cottons and yarns.

As my mother and I walked hand-in-hand to the school, my thoughts were not on stockings for elegant ladies. I was filled with dread.

There were no kindergartens at this time. I had no school experience at all. I knew none of the other children who would fill the classroom. Later I would grow to love Edward Brunson and Luther Kimrey and Z.Z. Harris, all classmates who would occupy my days for many years. On this day I was a tense little boy on the first day of school. Miss Pauline Whitley was my teacher. She was a severe lady who did little to ease my fears.

After the school bell rang and the students made their way into the classroom, Miss Whitley came to each table with large sheets of newsprint and placed a piece of paper in front of each child. In the middle of each table she placed a carton with red, yellow, white, green, orange and black tempera paints. We were invited to paint whatever we wished. World War II was in full cry. All the boys drew bombs falling from airplanes. The girls drew simple houses with stick figures sweeping around barren yards. For some reason which I cannot explain, I drew an enormous rabbit. It filled the entire sheet of paper. I painted the rabbit white, its eye red, the sky blue, the grass green and I made an orange sun which peeped out from the corner of the paper. And that was it. I was finished. The entire paper was filled. There were no blank spaces at all.

The principal of the school was a strong woman named Miss B.C. Parker. She brooked no foolishness. Miss Parker walked into the room and paced silently up and down the aisles looking at the paintings. When she came to my rabbit she stopped and exclaimed: "My what a wonderful rabbit!" She asked me to stand with the rabbit and let the class see it. Then, she took me along with my painting out into the hallway and we taped the painting up for all to see. Within an hour of the opening of school I was in love with it. I loved the first grade and the teachers and all my classmates. And forever, I loved Miss B.C. Parker.

That is the way school began for me 65 years ago. Painting was very important at Central Elementary School in Albemarle, North Carolina. Mill village kids came to school and fully embraced painting and singing. I loved school and couldn't wait to come back. I loved it because there would be painting there on most days. In the spring each year the North Carolina Symphony came to play. Mill village boys and girls got to see the symphony and Benjamin Swalin. In second grade my self portrait was chosen by a committee and sent with other paintings by American kids to France. After a while, all my teachers wanted my paintings for their personal collections. As I moved from grade to grade each teacher immediately asked me to do a painting. The boys in my class transported the easel and paints to a location on the school ground of the teacher's choice. While they read *See Scotty Run*, I painted the dogwood tree in bloom or the daffodils.

Then the earth turned and the sun rose and set and the stars glided by and the time came to choose a college. I was admitted to the School of Design at NC State University. I would paint great paintings and design skyscrapers. But, a funny thing happened on the way to Raleigh. The University of North Carolina at Chapel Hill offered a Morehead Scholarship and I traded painting for English and Blackstone.

As a lawyer, I continued to paint. My drawings and paintings hung in the homes of friends and on the walls in my children's houses. They laid around the house and leaned into corners in the basement. Sometimes I would work on one painting for a year. But, I was always painting. The paintings bloomed on the desert and were not viewed very much by people who were not desert dwellers, so to speak. Then one day the Mahler Gallery came calling. I had a visit from Rory Parnell and Megg Rader. Suddenly, my paintings have come to town. I have no expectation that the world will come calling and demand that I paint for a grateful throng of art lovers. If the people don't come, I will remind myself of a simple truth. I didn't paint these pictures for them. I painted them for Miss B.C. Parker. They owe their existence to her. And I know that somewhere she is happy about these paintings. Her only disappointment would be that among them there is no rabbit. Long may she run, along with my rabbit. ■

The Greening of the Handbook

In its continuing effort to save money and the environment, the North Carolina State Bar has decided not to print and mail the 2010 edition of the *Lawyer's Handbook*. For the past 14 years, receipt of this annual compendium of the State Bar's rules and ethics authorities has been a reliable harbinger of spring, bringing the Bar's entire membership, now in excess of 24,000 lawyers, up to date on professional regulation. Realizing, however, that the content of the *Handbook* is relatively slow to change and that the publication can be made available online quite inexpensively, the Bar's leadership has determined that it will henceforth provide hard copies on an every-other year basis only. Accordingly, the 2010 *Handbook* will be published only online. Members will be able to access the 2010 *Handbook* via the State Bar's website or they can download it directly to their computers for quicker access. Instructions for downloading will be found on the website. The 2011 edition will be printed and mailed as usual, and thereafter the sequence will repeat. It is believed that this measure will save tens of thousands of dollars in copying costs and postage this year. The 2010 *Handbook* will be posted online on or before April 1, 2010. ■

Another Beginning

By Sharon L. Wall, NCCP

As the North Carolina State Bar's Plan for Certification of Paralegals (the "Plan") enters its fifth year, it is astounding to see the number of paralegals who have chosen to advance the development of the North Carolina paralegal profession by supporting the Plan. To date there are approximately 4,500 paralegals who hold the title *North Carolina State Bar Certified Paralegal.*

The State Bar Board of Paralegal Certification ("Board"), the board that administers the Plan, is pleased to announce that, beginning with this issue, all North Carolina State Bar Certified Paralegals will receive quarterly issues of the State Bar *Journal.* This is a great way for paralegals to learn more about the regulation of the legal profession in North Carolina and to follow the latest news and events of the State Bar. In addition, there will be a regular column in each issue of the *Journal* dedicated to paralegal matters. Paralegals will now have a forum to address issues of interest regarding our profession and to catch up on the activities of the Board. The Board also is looking for paralegals and lawyers to author future articles. If you are interested, please contact the Board for more information.

It has been an honor to serve on the Board since its inception and to witness first-hand the phenomenal growth of the certification program since its creation in October 2004 and implementation on July 1, 2005. As you may know, we began the certification program with a grandfathering phase that ended in June 2007. Now, in order to become a State Bar Certified Paralegal, you must graduate from a qualified paralegal studies program approved by the Board and successfully pass the certification examination. We are pleased that to date 306 paralegals have successfully passed the exam.

If you are not familiar with the paralegal profession in North Carolina, history will show that creating a paralegal professional standard in North Carolina did not come overnight. The creation of the Plan is the result of the work and support of the State Bar officers and councilors, along with the support of many dedicated paralegal organizations and advocates for the paralegal profession. As a result of this great team effort, the Plan has established new professional standards for North Carolina paralegals and has encouraged a higher order of ethical and professional attainment. This much-needed benchmark has certainly enhanced the credibility of the paralegal profession in North Carolina.

Team effort is also required of any paralegal who assists a North Carolina lawyer to provide quality legal services to clients. We hope paralegals will find the State Bar *Journal* to be a helpful tool to learn more about the regulation of North Carolina lawyers, the rules and ethics opinions (do's and don'ts) that guide a lawyer's professional conduct, and how we, as paralegals, can be team players to enhance the practice of law. We also hope that lawyers will find this column to be a source of information and enlightenment about the paralegal profession in North Carolina. ■

New State Bar Councilors

In 2009, Judicial Districts elected 11 new members to the North Carolina State Bar Council. Following are our newest members, who each started service to the council in January 2010.

Barbara R. Christy of Greensboro (District 18), who is a graduate of UNC School of Law and practices with Schell Bray Aycock Abe & Livingston, PLLC.

Robert C. Cone of Greensboro (District 18), a graduate of UNC School of Law who is currently a member of Tuggle Duggins & Meschan, PA.

Robert W. Detwiler of Jacksonville, (District 4), who earned his JD from the Ohio State University School of Law and is a sole practitioner.

Nicholas J. Dombalis II of Raleigh (District 10), who is a Wake Forest University School of Law graduate, former assistant district attorney in Wake County, and currently practices with Nicholls & Crampton, PA.

Darrin D. Jordan of Salisbury (District 19C). Jordan graduated from Campbell University School of Law and is a partner with Whitley & Jordan, PA.

Nancy Black Norelli of Charlotte (District 26), a Northeaster University School of Law graduate who practices with Norelli Law, PLLC.

Lonnie M. Player Jr. of Fayetteville (District 12), a UNC School of Law graduate who practices with The Law Offices of Lonnie M. Player Jr., PLLC.

Carlyn G. Poole of Raleigh (District 10), who earned her JD from the UNC School of Law and an MA in English from Texas Tech. She practices with Tharrington Smith.

Randall B. Pridgen of Rocky Mount (District 7), who graduated from UNC School of Law and is a shareholder with Battle, Winslow, Scott & Wiley, PA.

Michael L. Robinson of Winston-Salem (District 21), who is a graduate of UNC School of Law and a partner with Robinson & Lawing, LLP.

Marvin R. Sparrow of Rutherfordton (District 29A), who was a paralegal prior to earning his JD from NC Central School of Law in 1983. Sparrow is a sole practitioner. ■

Committee Revisits Limitations on Interviewing a Child Victim in a Criminal Case

Council Actions

At a meeting on January 15, 2010, the State Bar Council adopted the opinions summarized below upon the recommendation of the Ethics Committee:

2008 Formal Ethics Opinion 11
Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee

Opinion rules that a lawyer may serve as the trustee in a foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters and that the other lawyers in the firm may also continue to represent the beneficiary on unrelated matters.

2009 Formal Ethics Opinion 1
Review and Use of Metadata

Opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication, and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

2009 Formal Ethics Opinion 3
Non-lawyer Employee Contacting Clients of Former Employer

Opinion rules that a lawyer has a professional obligation not to encourage or allow a nonlawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.

2009 Formal Ethics Opinion 12
Preparation of Documents for Unrepresented Adverse Party

Opinion rules that a lawyer may prepare an affidavit and confession of judgment for an unrepresented adverse party provided the lawyer explains who he represents and does not give the unrepresented party legal advice; however, the lawyer may not prepare a waiver of exemptions for the adverse party.

2009 Formal Ethics Opinion 15
Dismissal of DWI Charge by Prosecutor When Insufficient Evidence Due to Suppression Order

Opinion rules that a prosecutor must dismiss a DWI charge when the prosecutor fails to appeal a court order suppressing evidence from the traffic stop, thereby eliminating the evidence necessary to prove the charge.

Ethics Committee Actions

At its meeting on January 14, 2010, the Ethics Committee voted to withdraw and send the following proposed opinions to subcommittees for further study: Proposed 2009 FEO 11, *Representing Debtor in Bankruptcy When Lender is Current Client*; Proposed 2009 FEO 13, *Providing Limited Legal Services When Working with a Settlement Agent*; Proposed 2009 FEO 14, *Referral of Clients to Title Company Owned by Lawyer's Spouse*; Proposed 2009 FEO 16, *References to Selected Trial and Other Successes on Website*; and Proposed 2009 FEO 17, *Tacking as Question of Standard of Care*. Two proposed opinions, previously published in the *Journal*, were revised and appear below. Six new proposed opinions are also published for comment. The comments of readers are welcomed.

Proposed 2009 Formal Ethics Opinion 7
Interviewing a Child Abuse Victim
January 14, 2010

Proposed opinion rules that a criminal defense lawyer or a prosecutor may not interview a child who is the prosecuting witness in a criminal case alleging physical or sexual abuse if the child is younger than the age of maturity for criminal responsibility as determined by the General Assembly (currently age 16) unless the lawyer has the consent or authorization of a non-accused parent or guardian or a court order; a lawyer may interview a child who is the age of maturity for criminal responsibility as determined by the General Assembly or older without such consent or authorization provided the lawyer complies with Rule 4.3, reasonably determines that the child is sufficiently mature to understand the lawyer's role and purpose, and avoids any conduct designed to coerce or intimidate the child.

Introduction:[1]

This ethics opinion examines when a criminal defense lawyer or a prosecutor may interview a child who is the prosecuting witness in a criminal case alleging physical or sexual abuse

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, by March 30, 2010.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

of the child. The opinion is purposefully limited to this factual situation and does not address whether a lawyer may, for example, interview a child who is a witness to a crime but is not the victim of the crime. The absence of an opinion on the latter subject does not, however, mean that the Ethics Committee has concluded that such interviews are permissible without consent or authorization of a parent, guardian, or the court. A lawyer should take into consideration the principles articulated in this opinion when considering whether to interview any child who was a witness to a violent crime especially one involving the child's family members.

The opinion examines a difficult dilemma for lawyers who do not wish to interfere with an already traumatized child but who have a duty to prepare competently by investigating each case and interviewing key witnesses. In preparing this opinion, the Ethics Committee received input from mental health professionals and child advocates. That input lead to the committee's determination that the emotional and intellectual sophistication of a child cannot be determined by a lawyer or established by an opinion of the Ethics Committee. However, the General Assembly has determined that a child at a certain age is legally mature for the purpose of his or her own criminal culpability and, in the absence of any other benchmark, the committee accepts the General Assembly's policy decision on this issue.

When a lawyer is considering whether to seek the consent or authorization of a parent or guardian or a court order[2] to interview a child who is the victim of physical or sexual abuse, the lawyer should keep in mind the following information provided to the committee by the experts it consulted. Excessive interviews of child victims lead to additional trauma for the child. A person who is not trained in techniques for forensic interviewing of children often makes grave errors that can taint the interview or add to the child's trauma. It is preferable for the interview to be performed by a professional. To avoid intimidating the child, a support person for the child (family member or other appropriate person) should be present at the interview. In light of the foregoing, a lawyer should investigate whether forensic interviews with the child have already taken place and are available on tape; if a tape of an interview with the child is available, the lawyer should consider foregoing further interviews.

If not otherwise clear from the context, the conditions and limitations imposed by this opinion apply equally to prosecutors.

Inquiry #1:

Attorney A represents a criminal defendant on a charge of taking indecent liberties with a child. To prepare for trial, Attorney A would like to interview the child who is the victim of the alleged crime. The child is not a party to the criminal action. She does not have a lawyer and a guardian ad litem has not been appointed to represent her interests. May Attorney A interview the child without the consent of the child's parent or legal guardian?

Opinion #1:

No, if the child is younger than the age of maturity for criminal responsibility as determined by the General Assembly in the General Statutes, it is presumed that the child cannot understand the purpose of the interview, the lawyer's role, or the child's right to decline the interview or terminate the interview at any time. The age of maturity for criminal responsibility is currently 16 but may change by act of the General Assembly. *See* N.C. Gen. Stat. §7B-1604(a). If the child is the age of maturity for criminal responsibility or older, Attorney A may seek an interview with the child without the consent of the child's parent or legal guardian, provided Attorney A respects the rights of the child and there is no legal requirement that the consent of the parent or legal guardian be obtained. To the extent that this opinion is contrary to the holding in RPC 61 (defense lawyer may interview child victim of molestation without knowledge or consent of district attorney) that opinion is overruled.

It is Attorney A's professional duty to prepare competently and diligently to defend the client; *a priori*, in most cases this includes interviewing the victim of the alleged crime if the victim will consent to the interview. Nevertheless, a child frequently does not have the emotional or intellectual maturity to make an informed decision about whether to consent to the interview or the emotional or intellectual maturity to understand the role of the lawyer or the purpose of the interview.

Rule 4.3(b) states that, when dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not

> state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

As noted in comment [1] to Rule 4.3, "[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client."

Many children are inexperienced in legal matters and will not understand the role of a lawyer who seeks an interview. Many children will naively defer to the lawyer because he or she is an adult. Many children will be easily misled or subject to the undue influence of an authority figure such as a lawyer. Because of their psychological and emotional immaturity, it is, therefore, presumed that a lawyer may not interview a child who is younger than the age of maturity for criminal responsibility without violating Rule 4.3(b) unless the lawyer obtains the prior consent or authorization of the child's (non-accused) parent or legal guardian or obtains an order from a court with jurisdiction. A child who is the age of maturity for criminal responsibility or older may be interviewed without prior consent or authorization of a parent, guardian, or the court, provided the lawyer who seeks to interview the child reasonably determines that the child is sufficiently mature to understand, when disclosed by the lawyer, (1) the role of the lawyer, (2) who the lawyer represents, (3) the purpose of the interview, and (4) that the child is at liberty to refuse or to terminate the interview. If the lawyer cannot reasonably conclude that the child is sufficiently mature, both emotionally and intellectually, to understand these four things, the lawyer may not interview the child unless a legal guardian or parent consents or a court orders the interview. If the conduct of the legal guardian or the parent toward the child is at issue in the

criminal case, consent must be obtained from a guardian ad litem, a court, or other appropriate person or entity with authority to give consent. *See* Opinion #3; *see also* Rule 7.1 of the General Rules of Practice for the Superior and District Courts (providing procedure for appointment of lawyer to serve as guardian ad litem for minor who is victim or potential witness in a criminal proceeding).

Rule 3.4(b) prohibits a lawyer from counseling or assisting a witness to testify falsely. This includes making improper suggestions or offering inducements that might lead a naïve and vulnerable child to change or alter his or her testimony. Although a lawyer may reasonably conclude that a child who is the age of maturity for criminal responsibility or older is sufficiently mature to consent to the interview, the lawyer may not engage in emotional manipulation or other forms of undue influence, coercion, or intimidation that may inhibit or alter the witness's testimony.

Rule 4.2(a) prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the other lawyer consents or the communication is authorized by law or court order. Before interviewing a child, if allowed to do so under this opinion, the lawyer must determine whether the child is represented and, if applicable, follow the requirements of Rule 4.2(a).

Although a communication without the consent or knowledge of the child's parent or guardian may be allowed under this opinion, a lawyer should err on the side of giving notice to the parent or guardian—and preferably obtaining the consent of the parent or guardian—unless circumstances are such that the lawyer has a good faith belief that the child's candor may be affected by the knowledge of the parent.

Inquiry #2:

May the prosecutor interview the child who is the alleged victim of physical or sexual abuse?

Opinion #2:

Yes, subject to the same constraints set forth in opinion #1.

Inquiry #3:

The defendant is the child's parent or legal guardian and is accused of conduct that, if proven, would constitute abuse or neglect of the child. May the defendant's criminal defense lawyer interview the child subject to the constraints set forth in Opinion #1?

Opinion #3:

In most instances of alleged child abuse or neglect by a parent of guardian, a guardian ad litem (GAL) and an attorney advocate are appointed to represent the child. RPC 249 prohibits a lawyer from communicating with a child who is represented by a GAL and an attorney advocate unless the lawyer obtains the consent of the attorney advocate. If a GAL has not been appointed for the child, the lawyer may interview the child subject to the constraints set forth in Opinion #1.

Endnotes

1. This opinion does not address legal issues relating to due process or the confrontation clause.
2. See also Rule 7.1 of the General Rules of Practice for the Superior and District Courts which provides that the court may appoint a lawyer, from a list of *pro bono* lawyers, to serve as a guardian ad litem for a minor who is a victim or a potential witness in a criminal proceeding.

Proposed 2009 Formal Ethics Opinion 8
Service as Commissioner after Representing Party to Partition Proceeding
January 14, 2010

Proposed opinion provides guidelines for a lawyer for a party to a partition proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the partitioning of the property.

Inquiry #1:

Attorney is retained by a person with an interest in property to represent him in a proceeding to partition the property pursuant to Chapter 46 of the North Carolina General Statutes. N.C. Gen. Stat. §46-6 authorizes the court to appoint a disinterested person to represent any person interested in the property whose name is unknown and who fails to appear in the proceeding. May Attorney represent the existing client and also agree to be appointed to represent any unknown person with interest in the property?

Opinion #1:

No. There is a potential conflict between the interests of the existing client and the interests of the unknown person(s). One of the critical issues in a partition proceeding is whether the property should be sold or partitioned. *See, e.g.*, N.C. Gen. Stat. §46-22(c)(party seeking sale has burden of proving, by a preponderance of the evidence, that actual partition cannot be made without substantial injury to the interested parties). If Attorney has an existing client with a specific interest in the proceeding, Attorney cannot be disinterested as required by N.C. Gen. Stat. §46-6 or exercise independent professional judgment as required by the Rules of Professional Conduct when evaluating and representing the interests of the unknown person(s). The potential conflict cannot be resolved by consent because the unknown person(s) is unavailable to consent. Rule 1.7.

Inquiry #2:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property and, pursuant to N.C. Gen. Stat. §§1-399.4 and 46-28, appoints Attorney as the commissioner for the sale.[1] May Attorney serve as the commissioner and collect a commission from the public sale?

Opinion #2:

Yes, provided Attorney concludes that he can serve fairly and impartially and, further provided, Attorney terminates his representation of any person with an interest in the property.

The role of the commissioner is a neutral one with fiduciary responsibilities to all of the owners of the property. However, a commissioner conducting a public sale has limited discretion because he must follow the specific procedural requirements for judicial sales set forth in Chapter 1, Article 29A of the General Statutes. Attorney may, therefore, serve as commissioner for the sale upon determining that he can fulfill the role impartially, without bias for or against any of the parties to the partition proceeding, and upon terminating his representation of any person with an interest in the property. In the similar situation of a lawyer serving as a trustee on a deed of trust in foreclosure, the ethics opinions also allow the lawyer to relinquish the representation of the lender or the debtor to serve in the impartial fiduciary role of trustee for the foreclosure. *See* RPC 46, RPC 82, RPC 90.

N.C. Gen. Stat. §46-28.1 permits any party to a partition proceeding to file a petition for revocation of the order confirming the sale provided the petition is filed within

15 days and is based upon grounds that are specified in the statute. Therefore, the client's legal needs may not end with the entry of the order of sale and the appointment of a commissioner. Anticipating that a client might desire additional legal representation after the sale, the better practice is to obtain the client's consent to the lawyer's potentially limited representation by advising a client at the beginning of the representation of the following: the lawyer might be appointed by the clerk to serve as commissioner; that the lawyer will be required to withdraw from the representation to do so; that the lawyer must obtain the client's consent to such withdrawal; and that the client, upon consent, may need to find new representation. Then, before terminating the representation to serve as the commissioner for the sale, Attorney must obtain the client's consent to withdraw. *See* Rule 1.16.

Inquiry #3:

At the conclusion of the proceeding, the clerk of court orders a private sale of the property pursuant to N.C. Gen. Stat. §§46-28 and 1-339.33. May Attorney be designated as the person authorized to make the private sale pursuant to N.C. Gen. Stat. §1-339.33(1)?

Opinion #3:

Yes, subject to the conditions set forth in Opinion #2.

Inquiry #4:

If appointed the commissioner for a public sale or the person authorized to make the private sale, may Attorney purchase the property at the sale?

Opinion #4:

No. As the appointed commissioner or the person appointed to conduct the private sale, Attorney has a duty to oversee the sale of the property in a fair and impartial manner. Advancing a personal interest by bidding on or making an offer on the property violates this duty. *See* 2006 FEO 5 (county tax lawyer who is appointed commissioner may not bid at tax foreclosure sale).

Inquiry #5:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property but appoints another person as commissioner for the sale. May Attorney bid at the sale on his own behalf?

Opinion #5:

No. This would be a conflict of interest between the lawyer's self-interest in purchasing the property at the lowest price and the client's interest in selling the property for the highest price. Rule 1.7(a)(2). However, Attorney may bid on the property if he is doing so on behalf of the client.

Inquiry #6:

At the conclusion of the proceeding, the clerk of court orders the partition of the property. May Attorney agree to be appointed as one of the three commissioners responsible for dividing the property?

Opinion #6:

No. A commissioner for a partitioning must exercise discretion in determining how to divide the property, thus directly affecting the interests of the various parties to the proceeding. Moreover, there remain opportunities for Attorney to advocate for his client's interests in the event the commissioners seek input from the parties or in the event of an appeal. Attorney cannot, therefore, serve as an impartial commissioner. Rule 1.7(a).

Inquiry #7:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as one of the commissioners to conduct the sale or to partition the property?

Opinion #7:

Yes, provided Attorney determines that he can act impartially. *See* Opinion #1 and Rule 1.7.

Inquiry #8:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as the court-appointed lawyer for any "unknown owner" pursuant to N.C. Gen. Stat. §46-6?

Opinion #8:

Yes, with the informed consent, confirmed in writing, of Attorney's former client(s). Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing a new client in the same or a substantially related matter if the interests of the new client are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

Inquiry #9:

Assume that Attorney formerly represented one or more of the parties in a separate but related partition proceeding (i.e., a prior proceeding involving the same property that did not result in partition or sale), but does not represent any of the parties to the current proceeding.

May Attorney purchase the property at the sale?

Opinion #9:

Yes, unless Attorney received confidential information from a former client relative to the property that Attorney could use to the former client's disadvantage when bidding on the property. Rule 1.9(c)(1).

If a lawyer no longer represents a former client, the lawyer's only duties to the former client are to avoid adverse representations of others in the same or a substantially related matter and to avoid using confidential client information to the disadvantage of the former client. Although the partition sale may be substantially related to the prior partition proceeding, a lawyer who is purchasing for his own interest is not engaged in the representation of an adverse party and, therefore, the prohibition on representations adverse to a former client in Rule 1.9(a) is inapplicable. However, the prohibition on using the confidential information of a former client to the disadvantage of the former client would apply unless, as Rule 1.9(c)(1) permits, the information has become generally known.

Endnote

1. Although the procedure for judicial sales of property set forth in Chapter 1, Article 29A, of the General Statutes provides for the appointment of only one commissioner, it is still the custom in some judicial districts for the clerk of court to appoint three commissioners. The conditions on service as a commissioner for the public sale of property set forth in this opinion apply equally to a lawyer who is appointed by the clerk to serve on a panel of commissioners.

Proposed 2010 Formal Ethics Opinion 1
Representation of Insurance Carrier after Insured Disappears
January 14, 2010

Proposed opinion rules that a lawyer retained by an insurance carrier to represent an insured whose whereabouts are unknown and with whom the lawyer has no contact may not appear as the lawyer for the insured absent authorization by law or court order.

Inquiry #1:

Attorney was retained by Insurance Carrier to defend Insured in a negligence lawsuit based upon an automobile accident. Insured cannot be located and his whereabouts are unknown. Service by publication was required. May Attorney proceed with the representation, file pleadings on behalf of Insured, and appear in court to defend the case on behalf of Insured?

Opinion #1:

No. To respond to this inquiry, the question of whether a client-lawyer relationship is created between Attorney and Insured must be addressed. Comment [4] of Rule 0.2, *Scope*, provides that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." In most instances, the Ethics Committee declines to offer an opinion that hinges upon a question of law. Nevertheless, the determination of whether a client-lawyer relationship exists is often essential to the committee's interpretation and application of the Rules of Professional Conduct. Moreover, the relevant North Carolina case law is clear. In *Dunkley v. Shoemate*, 350 N.C. 573, 515 S.E. 2d 442 (1999), the Supreme Court held that where a law firm had no contact with the defendant and was not authorized by the defendant to undertake his representation, no lawyer-client relationship existed between the defendant and the lawyers seeking to represent him pursuant to the insurance trust fund for the defendant's employer. The *Dunkley* opinion cites favorably the following statement from *Johnson v. Amethyst Corp.*, 120 N.C. App. 529, 463 S.E. 2d 397 (1995): "[n]o person has the right to appear as another's attorney without the authority to do so, granted by the party for which he [or she] is appearing." *Id.* at 577, 515 S.E. 2d at 444 [*quoting Amethyst Corp.* 120 N.C. App. at 532, 463 S.E. 2d at 400]. The Court also concurred with the statement in *Amethyst Corp.* that, "North Carolina law has long recognized that an attorney-client relationship is based upon principles of agency," and "[t]wo factors are essential in establishing an agency relationship: (1) The agent must be authorized to act for the principal; and (2) The principal must exercise control over the agent.'" *Id.* [*quoting Amethyst Corp.*, 120 N.C. App. at 533-534, 463 S.E. 2d at 400].

Therefore, unless allowed by statute, court order, or subsequent case law, a lawyer may not appear in court for a party who has not authorized the representation and with whom the lawyer has not established a client-lawyer relationship.

Inquiry #2:

Would the response to Inquiry #1 be different if the insurance contract with Insured specifies that Insurance Carrier has the authority to choose legal counsel for Insured and to decide whether to settle the case?

Opinion #2:

No.

Inquiry #3:

Would the response to Inquiry #1 be different if Insured received actual notice of the lawsuit and contacted Insurance Carrier before disappearing?

Opinion #3:

Whether such contact with Insurance Carrier is sufficient to create a client-lawyer relationship with a lawyer selected by Insurance Carrier is a question of fact and law not resolved by the existing case law. However, the Ethics Committee doubts that the two factors required to establish an agency relationship exist in this situation. *See also Dunkley*, 350 N.C. at 578, 515 S.E. 2d at 445 ("RPC 223, Rule 1.2(a), and *Amethyst Corp.* correctly emphasize the principle that a lawyer cannot properly represent a client with whom he has no contact.").

Inquiry #4:

Would the response to Inquiry #1 be different if Insured received notice of the lawsuit and specifically authorized the representation before disappearing?

Opinion #4:

Yes, Attorney may appear in the lawsuit on behalf of Insured if Insured has authorized the representation. However, if Insured cannot thereafter be located, Attorney may not mislead the court about Insured's absence. Rule 3.3(a)(1). Moreover, in the event Insured is not present to participate in the representation, Attorney may have to file a motion to withdraw. Rule 1.2, cmt. [1] (Client has "the ultimate authority to determine the purposes to be served by legal representation...."); Rule 1.16; RPC 223; 03 FEO 16; *see also Dunkley*, 350 N.C. at 578, 515 S.E. 2d at 445 ("a lawyer cannot properly represent a client with whom he has no contact.").

Inquiry #5:

Would the response to Inquiry #1 be different if the insurance contract contained a provision granting Insurance Carrier the express authority to proceed with the representation on behalf of and in the name of the Insured in the event contact with Insured is lost?

Opinion #5:

This is a question of law that is not resolved by the existing case law and is outside the purview of the Ethics Committee.

Inquiry #6:

Attorney is retained by Insurance Carrier to defend a "John Doe" defendant in an automobile accident case. May Attorney represent "John Doe" in the court proceedings?

Opinion #6:

If the designation of a certain person as "John Doe" is necessary to effect service of process and Attorney concludes that he is able to identify the intended person (e.g., an employee of an insured defendant company), Attorney may work with Insurance Carrier and the defendant company to identify the individual and, once identified, may appear in the lawsuit on behalf of the individual if authorized to do so by the individual. If the identity of "John Doe" cannot be ascertained by Attorney, Insurance Carrier, or another client, whether Attorney may represent "John Doe" in the court proceedings is a question of law outside the purview of the Ethics Committee.

Proposed 2010 Formal Ethics Opinion 2
Obtaining Medical Records From Out of State Health Care Providers
January 14, 2010

Proposed opinion rules that a lawyer may not serve an out of state health care provider with an

unenforceable North Carolina subpoena and may not use documents produced pursuant to such a subpoena.

Inquiry #1:

Lawyer represents the Department of Social Services in a county that borders another state. In a particular case, the relevant hospital records are located out of state. Is it ethical for Lawyer to subpoena the medical records under the authority of N.C. R. Civ. P. 45 knowing that the North Carolina subpoena is unenforceable?

Opinion #1:

No. If the North Carolina subpoena is not enforceable out of state, the lawyer may not misrepresent to the out of state health care provider that it must comply with the subpoena. RPC 236 provides that it is unethical for a lawyer to use the subpoena process to mislead the custodian of documentary evidence as to the lawyer's authority to require the production of such documents. *See also* Rule 8.4(c) (professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Inquiry #2:

If the records are subpoenaed and the health care provider complies with the subpoena, may Lawyer utilize the medical records?

Opinion #2:

No. Lawyer may not use documents that were produced in reliance on Lawyer's misrepresentation as to Lawyer's authority to require the production of such documents.

Proposed 2010 Formal Ethics Opinion 3
Cross-examining Current and Former Clients
January 14, 2010

Proposed opinion rules that it is a non-consentable conflict of interest for a lawyer to cross-examine a current client or, if the lawyer possesses relevant confidential information that is not generally known, to cross-examine a former client.

Inquiry #1:

Lawyer is a criminal defense lawyer who represents persons charged with various criminal and traffic offenses. Lawyer also represents police officers responding to investigations by internal affairs departments. In these matters, the officers are threatened with professional discipline, including possible termination, for alleged conduct involving moral turpitude, dishonesty, or police department policy violations. In such matters, Lawyer represents the police officer individually and does not represent the police department.

Lawyer represents Defendant in a criminal matter. Lawyer also currently represents Officer in an internal affairs investigation in which Officer may be disciplined or lose his job. Officer is one of the prosecuting witnesses in Defendant's criminal matter.

May Lawyer represent Defendant in the criminal matter if Officer is a prosecuting witness?

Opinion #1:

No. If the competent representation of the defendant requires a rigorous cross-examination of the prosecuting witness, the lawyer has a conflict of interest. *See* Rule 1.7(a). Such a scenario implicates the lawyer's duties of loyalty and confidentiality. *See* Rule 1.6; Rule 1.7. This opinion is not limited to this fact pattern.

Comment [6] to Rule 1.7 provides that a directly adverse conflict of interest may arise when a lawyer is required to cross-examine a client who appears as a witness in a matter involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. If Lawyer has confidential information of Officer that is relevant to the cross-examination, a vigorous cross-examination will breach Lawyer's duty of confidentiality to Officer. Alternatively, Lawyer could fail to cross-examine Officer fully, for fear of misusing such information, which would be a breach of Lawyer's duty to competently and diligently represent Defendant. Defendant might conclude that Lawyer's deferential cross-examination of Officer was the result of Lawyer's divided loyalties, while Officer could reach the same conclusion about a vigorous cross-examination.

The conflict of interest is non-consentable. Generally, if a lawyer with a conflict reasonably believes that he will be able to provide competent and diligent representation to both clients, he may take on the representation so long as he obtains both clients' informed written consent. *See* Rule 1.7(b). However, certain conflicts are non-consentable, "meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." Rule 1.7, cmt. [14]. Consentability is determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to the representation given the conflict of interest. Representation is prohibited if the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client. *See* Rule 1.7, cmt. [15]. For the reasons previously stated, Lawyer cannot reasonably conclude that he can adequately represent Defendant if he has to cross-examine Officer.

Inquiry #2:

Does it matter if Officer's personnel files are generally not subject to subpoena and may not be used for cross examination?

Opinion #2:

No. Although the fact that Officer's personnel files may not be used for cross-examination may appear to alleviate the concern as to Lawyer's duty of confidentiality to Officer, Lawyer remains aware of confidential information relative to Officer that could inspire questions for cross examination. But for the fact that the information was received from Officer, the competent representation of Defendant would compel Lawyer to use this information to develop his cross-examination. As observed in Opinion #1, this would be a breach of Lawyer's duty of confidentiality to Officer.

Inquiry #3:

Would it matter if Defendant was charged only with a minor traffic violation?

Opinion #3:

If Officer's testimony relates only to an uncontested issue and Lawyer reasonably concludes that he can forgo cross examination of Officer without affecting the competent defense of the case, Lawyer may represent Defendant provided he obtains the informed written consent of Defendant. *See* Rule 1.7(b). If Lawyer determines that he should cross examine Officer but that the cross examination can be limited to factual questions that avoid challenging Officer's credibility or utilizing his confidential information, Lawyer may proceed but only with the informed written consent of both clients. *See* Rule 1.7(b).

Inquiry #4:

Would it make any difference if the Fraternal Order of Police or a similar organ-

ization arranged for or retained Lawyer to represent Officer?

Opinion #4:

No. Regardless of who retains Lawyer to represent Officer, Lawyer still owes Officer the same duties of confidentiality and loyalty. *See* Rule 1.8(f). Also, Lawyer's pecuniary interest in obtaining further business from the hiring organization may create an additional personal conflict of interest for Lawyer in that he would want to avoid rigorously cross examination of a police officer to remain in the good graces of the organization. *See* Rule 1.7(a)(2).

Inquiry #5:

What if Officer is a former client at the time of the representation of Defendant? Is Lawyer required to disclose the former client-lawyer relationship with Officer to Defendant at the outset so that Defendant can make an informed decision about representation?

Opinion #5:

If Lawyer obtained confidential information from Officer that is relevant to Officer's cross-examination and Lawyer needs to use that confidential information to effectively cross-examine Officer, then Lawyer may not represent Defendant. *See* Rule 1.9(c); 2003 FEO 14.

An exception to Rule 1.9(c) provides that a lawyer may use confidential information of a former client to the disadvantage of the former client when the information has become "generally known." Rule 1.9(c)(1). If certain information as to the internal affairs investigation is generally known, that information may be used to cross-examine Officer without obtaining the consent of Officer. *See* Rule 1.9, cmt. [8].

If Lawyer determines that he does not need to use any confidential information that is not generally known to effectively cross-examine Officer, Lawyer must still disclose the former lawyer-client relationship with Officer to Defendant so that Defendant can make an informed decision about Lawyer's representation.

Proposed 2010 Formal Ethics Opinion 4
Lawyer Participating in Barter Exchange Program
January 14, 2010

Proposed opinion rules that lawyer may not participate in a barter exchange program where a percentage of the amount involved in each barter transaction is paid to the barter exchange program.

Inquiry:

Lawyer would like to participate in a barter exchange program. Program members get paid in barter units that can be used to pay other members for their services. For example, a lawyer might prepare a will for a member and receive "barter points." The barter points could then be used by the lawyer to purchase services from another program member. The program requires its members to pay a ten percent "fee" on each purchase made through the program. If Lawyer provides $500 in services to another member, that member would pay a $50 fee to the program for a total payment of $550.

There is a list of lawyers on the program website, but members are encouraged to call their brokers to get linked with other members when in need of a particular service. Lawyers who participate in the program are not under any obligation to do business with exchange members who request services.

May Lawyer participate in the program?

Opinion:

No. A lawyer may accept payment for legal services in a form other than money. *See* Rule 1.5, cmt. [4]. However, a lawyer may generally not share legal fees with a nonlawyer or give anything of value to a person for recommending the lawyer's services. Rule 5.4(a); Rule 7.2(b).

The South Carolina Ethics Advisory Committee considered participation in a similar barter exchange program in S.C. Bar Ethics Advisory Comm., Op. 94-34 (1994). As a member of the program, the lawyer would provide legal services to other members at normal rates but, instead of receiving cash, the lawyer would receive credit for the amount of the fees. The credit could be used for the purchase of goods and services from other members. The lawyer would receive credit for the full amount of his legal fees, but when purchasing goods and services from other members the lawyer was required to pay a ten percent commission to the exchange. The Committee found that participation in the program violates the prohibition against sharing legal fees with a nonlawyer and the prohibition against paying for referrals.

The Committee stated:

> It is disingenuous in the proposed business exchange relationship to suggest that because the lawyer receives credit for the full attorney's fees that there is no sharing of the fee with a nonlawyer. In the first place the credit that the lawyer receives is subject to the payment of a ten [percent] commission to a nonlawyer when it is used for the purchase of goods and services from other members with the result that the lawyer does not in fact receive the full amount of the fee. Moreover, the member who retains the services of the lawyer is paying ten [percent] more for the legal services than the lawyer receives and the ten [percent] surcharge is being paid directly to a nonlawyer. The mere fact that the ten [percent] commission does not go through the lawyer's hands and is paid directly to the nonlawyer does not affect the substance of the transaction. In such a situation the lawyer is in fact paying a nonlawyer a ten [percent] commission for channeling work to him, a practice that is prohibited by Rule 7.2(c).

Id. Other jurisdictions have reached the same conclusion. See, *e.g.*, Prof'l. Ethics Comm. for the State Bar of Tex., Op. 435 (1986); Va. State Bar, Standing Comm. on Legal Ethics, Op. 1035 (1988); *see also* Fla. Ethics Op. 84-2(1984)(lawyer prohibited from participating in barter exchange programs in which a percentage of the amount involved in each purchase transaction was paid to the program, but may participate in programs proscribing the charging of a transactional fee when legal services are rendered.) However, New York and Utah allow lawyer participation in barter exchange programs that meet certain requirements. *See* N.Y. State Bar Assoc. Comm. on Prof'l. Ethics, Op. 665 (1994); Utah State Bar Ethics Advisory Op. Comm., Op. 97-05 (1997)(exchange may not interfere with lawyer's professional judgment; advertising materials must comply with ethics rules; exchange may not refer clients to participating lawyers other than through the use of advertising that complies with ethics rules; the exchange and its agents may not engage in in-person solicitation of lawyers' services; and lawyer's fee to client must be reasonable.).

We agree with the rationale of the South Carolina Ethics Advisory Committee and conclude that participation in the proposed barter exchange program would violate the prohibition against fee-splitting as well as the prohibition against paying for referrals.

Proposed 2010 Formal Ethics Opinion 5
Client-Lawyer Relationship in Child Support Enforcement Actions
January 14, 2010

Proposed opinion rules that the lawyer for a child support enforcement program that brings an action for child support on behalf of the government does not have a client-lawyer relationship with the custodian of the children.

Inquiry #1:

Title IV-D of the Social Security Act, 42 U.S.C.S. 651 *et seq.*, requires each state to establish a child support enforcement (CSE) agency to provide services for the establishment and collection of child support for dependent children who are recipients of public assistance. The act also requires the CSE agency to provide assistance in the collection of child support to a custodian of a dependent child not receiving public assistance if the custodian applies to the agency for such assistance. The Child Welfare Act, Chap. 110, Art. 9, of the N.C. General Statutes, enacts the requirements of Title IV-D. The CSE program established by the North Carolina act is administered by the Child Support Enforcement Agency, a branch of the North Carolina Department of Health and Human Services. The program is usually administered at the county level; the local CSE program administrator hires a lawyer to institute the child support proceeding against the non-custodial, responsible parent. The proceeding is instituted in the name and on behalf of the government at the instigation of the custodian of the child who is named *ex relatione* (e.g., *County of Durham DSS ex rel. Stevons v. Charles*, 182 N.C. App. 505, 642 S.E. 2d 482 (2007)).

Lawyer A is defending a non-custodial parent in a child support action brought by the lawyer for the child support enforcement (CSE) program for the county. Does the CSE lawyer represent the custodian of the children?

Opinion #1:

The lawyer representing the CSE program does not represent the custodian of the children; the lawyer represents the government agency bringing the action. As previously observed in Ethics Decisions 279 and 2007-3, the purpose of the CSE program is to provide financial support to dependent children regardless of who currently has custody of a dependent child and regardless of who may currently owe support payments. "It would defeat the purpose of [CSE] legislation if a client-lawyer relationship were automatically created between the [CSE] lawyer and the custodian of the children because the lawyer would be unable to pursue any future child support action against such custodian should support and custody obligations switch." ED 279.

Nevertheless, if the CSE lawyer makes statements to the parent that would lead a reasonable person to believe that the lawyer is representing him or her personally, a client-lawyer relationship may be inferred. To avoid misleading the custodian as to the relationship, in any private conference with a custodian (outside of court proceedings), "the [CSE] lawyer should explain that he or she is not the custodian's lawyer; that their conversations are not protected by the duty of confidentiality; and that if the interests of the government and the custodian of the children diverge, the lawyer will represent the interests of the government." ED 279.

Inquiry #2:

Lawyer A wants to serve discovery on the custodian of the children. Should the discovery be served on the lawyer for the CSE program or on the custodian of the children?

Opinion #2:

This is a question of civil procedure and trial strategy that is outside of the purview of the Ethics Committee. However, if Lawyer A decides to seek information directly from the custodian, it would not violate Rule 4.2 unless the custodian is represented by his or her own lawyer in the matter.

During the representation of a client, Rule 4.2 prohibits a lawyer from communicating with a person that the lawyer knows is represented in the matter unless the lawyer has the consent of the other lawyer or is authorized by law or court order to communicate with the person. Lawyer A's direct communications with the custodian will not violate Rule 4.2 because the CSE lawyer does not represent the parent. ED 2007-3 (lawyer appointed to represent defendant/non-custodial parent in child support case may communicate directly with custodial parent).

Inquiry #3:

Lawyer A wants to depose the custodian. The CSE lawyer informed Lawyer A that he would not attend the deposition. May Lawyer A proceed with the deposition?

Opinion #3:

Yes. If the custodian was properly served with notice of the deposition, there is no prohibition on proceeding with the deposition although the CSE lawyer fails to appear. Even when a deponent is represented by a lawyer in a matter, if the deposition is properly noticed and the lawyer for the deponent fails or refuses to appear, the lawyer noticing the deposition may proceed. Such communications are "authorized by law" and, therefore, not prohibited by Rule 4.2.

Inquiry #4:

In a case involving international child support enforcement issues, the CSE lawyer, who works in the North Carolina Attorney General's Office, would like to call another lawyer from the attorney general's staff to testify as an expert. Does this violate the Rules of Professional Conduct?

Opinion #4:

No. Rule 3.7(a) prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. However, this disqualification is not imputed to the other lawyers in same firm or organization unless the lawyer's testimony would be adverse to the interests of the firm or organization's client. Rule 3.7(b)

Proposed 2010 Formal Ethics Opinion 6
Advertising for Legal Employment in Non-practicing Areas with Intent to Refer Cases
January 14, 2010

Proposed opinion rules that a lawyer may not advertise for legal employment in an area of practice in which the lawyer does not currently practice law with the intent to refer any cases to another law firm.

Inquiry #1:

Lawyer would like to advertise for legal employment in several areas of negligence law including products liability, pharmaceutical, and medical malpractice. However, Lawyer does not actually practice in each of these legal areas. For cases involving areas of law in which Lawyer does not practice, Lawyer would refer the matter to another law firm that is qualified in

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Amendments Approved by the Supreme Court

At a conference on January 28, 2010, the North Carolina Supreme Court approved the following amendments to the rules of the North Carolina State Bar:

Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 6.1, *Voluntary Pro Bono Publico Service*

New Rule of Professional Conduct 6.1 declares that a lawyer has a professional responsibility to render pro bono legal services. The rule is not mandatory and sets forth only an aspiration goal for each lawyer of at least fifty hours of pro bono work annually.

Amendments to the IOLTA Rules

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

The rule amendments implement interest rate comparability for the IOLTA program by requiring lawyers to maintain their IOLTA accounts only at banks that agree to pay the same interest on IOLTA accounts that is paid by the bank on similar accounts of the bank's other customers. The comparability rule becomes effective July 1, 2010.

Amendments Pending Approval of the Supreme Court

At its meetings on October 23, 2009, and January 15, 2010, the council of the North Carolina State Bar voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed amendments, see the Fall 2009 and Winter 2010 editions of the *Journal* or visit the State Bar website: www.ncbar.gov):

Proposed Elimination of the Rule Requiring Certification of Insurance Coverage

27 N.C.A.C. 1A, Section .0200, Membership-Annual Membership Fees

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

Since 2004, every member has been required annually to submit a certificate stating whether the member is engaged in the private practice of law and, if so, whether the member is covered by a policy of professional liability insurance. However, the information is not sufficiently useful or reliable to justify the cost of its collection and publication on the State Bar website. It is, therefore, proposed that the requirement be eliminated by the deletion of the enabling rule in its entirety and by eliminating references to the requirement from the rules on administrative suspension.

Proposed Amendment to the Procedures for the Ethics Committee

27 N.C.A.C. 1D, Section .0100, Procedures for Ruling on Questions of Legal Ethics

The proposed amendments codify a procedure for a consent agenda to remove items from the Ethics Committee's agenda that do not warrant discussion by the full committee.

Proposed Amendments to the Rules Governing the Attorney/Client Assistance Program

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

It is proposed that the standing committee in charge of the Attorney/Client Assistance Program be eliminated and the program continue to operate under the auspices of the Grievance Committee. Changes to the operating rules for the fee dispute resolution program are also recommended to make the rules more accurately reflect the actual procedures and functioning of the program.

Proposed Amendments to the Procedures for the Administrative Committee

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

The proposed rule amendments will empower the executive director of the State Bar to reinstate a member who was administratively suspended upon the member's satisfaction of all membership obligations, the payment of all associated fees, and the executive director's determination that there are no persisting issues relating to the member's character or fitness.

Proposed Amendments to the CLE Rules

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

The proposed amendments would require all newly admitted lawyers to complete a 12-hour course of instruction on professionalism, professional responsibility and law office management to be known as the North Carolina State Bar New Admittee Professionalism Program. If the rule amendments are approved by the Supreme Court, lawyers admitted to the State Bar on or after January 1, 2011, will be required to fulfill this new CLE requirement.

Other proposed amendments to the CLE rules will prohibit a disbarred lawyer from teaching an approved CLE course within five years of the effective date of the disbarment.

Proposed Amendments to the Plan of Legal Specialization

27 N.C.A.C. 1D, Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization; Section .2900, Certification Standards for the Elder Law Specialty

Proposed amendments to the hearing and appeal rules of the specialization pro-

gram improve the clarity of the rules, streamline the appeal process, and make hearings less adversarial.

Proposed amendments to the standards for the elder law specialty make the experience requirements for certification the same as those required by the National Elder Law Foundation, the testing organization for the elder law specialty.

Proposed Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals, and Section .0200, Continuing Paralegal Education

The proposed amendments allow a Juris Doctor degree from an ABA-accredited law school to satisfy the educational requirements for certification and prohibit continuing paralegal education credit for self-study except for courses taken online.

Proposed Amendments

At its meeting on January 14, 2010, the Executive Committee of the council accepted the report and recommendation of the Ethics Committee to withdraw proposed amendments to Rule of Professional Conduct 8.3, *Reporting Professional Misconduct*, published for comment in the Winter 2010 *Journal*, and to permit the Ethics Committee to study the proposed amendments further. The proposed amendments would exempt a lawyer serving as a mediator who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators from reporting information learned during a mediation relative to another lawyer's misconduct.

At its meeting on January 15, 2010, the council voted to publish the following proposed rule amendments for comment:

Proposed Amendments to Rules Governing Judicial District Grievance Committees

27 N.C.A.C. 1B, Section .0200, Rules Governing Judicial District Grievance Committees

The proposed amendments will increase the members of a district grievance committee.

.0201 Organization of Judicial District Grievance Committees

(a) ...

(c) Appointment of District Grievance Committee Members

(1) Members of District Committees - Each district grievance committee shall be composed of not fewer than five nor more than ~~13~~ 21 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district grievance committee may also include one to ~~three~~ five public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district grievance committee.

...

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal*. They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

Legal Hiring (cont.)

Class of 2009 who is living with her parents and working in a temporary in-house position conceded, "No one wants to hire someone who is not quite sure what they want to do." She admits that she "need[s] to be able to articulate clearly and confidently what I want to do," but the fact remains she is just not sure of her path. In a less-than-robust job market, people with such uncertainty are having a difficult time.

Each new graduate has a unique story, but the bottom line is that some members of the Class of 2009 seeking work in North Carolina are thriving and some are struggling—and more are struggling than in past years. Many graduates have had to amend their expectations, be flexible, take temporary positions, seek longer, and work harder before landing a job. Their career paths are not easy ones. North Carolina's lawyers, law schools, and professional organizations must remain committed to assisting these newest members of the bar in every way they can. ■

Maria J. Mangano is herself a graduate of the University of North Carolina School of Law and is the director of career services there. Her previous article for the State Bar Journal, Changing Times: The 'Second Generation' of Women Lawyers Speaks out on Motherhood, *appeared in the Fall 2005 edition.*

A Worrisome Letter (cont.)

I turn and walk toward the door. I hear the whispering and I see people nodding my way.

Suddenly, I'm not intimidated by that. I have a new opinion of those pointing and of the one at which they are pointing. My favorite kindergarten play date is going to be eating at one of her preferred restaurants and will have to hear about another one of my days. ■

Greg Grogan is a former prosecutor turned real estate attorney. He lives in Paulding County, Georgia, but works with clients in North Carolina, and he still remembers his first time standing before a judge in a courtroom.

Grievance Committee and DHC Actions

Disbarments

Hilton Mitchell of Wilmington surrendered his law license to the Disciplinary Hearing Commission (DHC) and was disbarred. Mitchell misappropriated $21,665 from his employer's law firm by instructing clients to pay legal fees directly to him.

J. Scott Taggart of Greenville was disbarred by the DHC. Taggart misappropriated entrusted funds totaling at least $76,000 from his law firm's general trust account and more than $150,000 from a dedicated estate trust account. Taggart also engaged in multiple instances of mortgage fraud by preparing false HUD-1s and deliberately notarizing forged signatures.

The DHC reinstated the order of discipline disbarring **Brent Wood** of Cary. Wood was convicted of multiple federal criminal offences showing professional unfitness. As required by statute, the State Bar consented to vacate the order of discipline when the trial court entered a post-verdict judgment of acquittal. The DHC reinstated the order of discipline after the 4th Circuit reversed and vacated the judgment of acquittal.

Suspensions & Stayed Suspensions

While he was serving an active suspension for other disciplinary violations, **D. Bernard Alston** of Henderson failed to respond to numerous communications from the Bar. In a 2007 case, the DHC imposed a five-year suspension. After serving 18 months of that initial suspension, Alston would have been eligible to seek a stay of the balance. Instead, the DHC imposed another five-year suspension. After serving 18 months of the new suspension, Alston can seek a stay of the balance upon proving compliance with numerous conditions.

R. T. Hayes of Raleigh was suspended for five years by the DHC. The effective date of the suspension is September 9, 2005, when he was administratively suspended. The balance of the suspension is stayed upon compliance with numerous conditions. Hayes failed to reconcile his trust account and failed to disburse entrusted funds promptly.

Jennifer Leech of Wilmington was suspended for three years by the DHC. The suspension is stayed for three years upon numerous conditions. Leech ran what she called a "law firm" purporting to have firm members across the state. The alleged members were actually independent contractors. She obtained traffic ticket clients by mass direct mail solicitation. Many clients were neglected.

The DHC suspended **Terry B. Richardson** of Wilmington until December 2011. The suspension is stayed until December 2011 upon numerous conditions. Richardson made unauthorized disbursements of entrusted funds to himself and to third parties, failed to properly maintain trust account ledgers and records, failed to reconcile his trust account quarterly and charged a clearly excessive fee.

Robert Trobich of Charlotte was suspended for two years by the DHC. The suspension is stayed for three years upon numerous conditions. Trobich neglected his client's lawsuit, resulting in dismissal of her claims with prejudice, falsely told his client he had settled her case, paid his client from his own funds while representing that the funds were from the settlement, and made false misrepresentations to the Grievance Committee.

Censures

Reginald D. Alston of Winston-Salem was censured by the DHC. Alston engaged in discourteous behavior toward the clerk of court and her staff and filed a frivolous motion to hold the clerk in contempt.

The DHC censured **Amanda Dixon** of Raleigh. Dixon put false information on two HUD-1 Settlement Statements. There were substantial mitigating circumstances, including that the violations were unwitting, that Dixon readily admitted her wrongdoing when it was pointed out, that Dixon cooperated in a criminal prosecution of the seller and cooperated with the Bar, and that Dixon has not engaged in any other known misconduct in the intervening five years.

Abigail P. Matre of South Hill, SC, was censured by the Grievance Committee. Matre is licensed to practice law in South Carolina but not in North Carolina. She held herself out as being able to provide legal services in North Carolina. She also improperly identified herself as a specialist in real estate law.

The Grievance Committee censured **C. Gary Triggs** of Morganton, who failed to adequately protect two clients' interests when the representation ended, failed to adequately communicate with a client, failed to participate in good faith in the State Bar's fee dispute resolution process, charged an excessive fee, and used incomprehensible language in a fee agreement.

Reprimands

Richard Biemiller of Virginia Beach was reprimanded by the Grievance Committee. Biemiller represented the plaintiffs in a lawsuit. The presiding judge took a motion under consideration and invited the parties to submit additional information after the hearing. Biemiller sent additional material to a different judge who had not presided at the hearing and incorrectly represented that the second judge had heard the motion. Biemiller declined opposing counsel's request that he correct his error and direct the information to the appropriate judge. Biemiller also had improper *ex parte* communication with a judge.

The Grievance Committee reprimanded **Charles Mark Feagan** of Columbus. Feagan neglected two client matters, failed to participate in good faith in the State Bar's fee dispute resolution process, and failed to respond to the Grievance Committee.

Raleigh lawyer **Randolph Hill** was reprimanded by the Grievance Committee. Hill was paid $3,500 to review a criminal file and determine if the client had grounds to file a motion for appropriate relief. Hill did not communicate with his client and did not provide the services for which he was paid. Hill did not honor the client's request for a refund of the unearned fee. He failed to participate in good faith in the State Bar's fee dispute reso-

lution process and failed to respond to the Grievance Committee.

J. Frank Lay of Sylva was reprimanded by the Grievance Committee. Although Lay had reason to believe and was in fact notified that a person with whom he was communicating was represented by counsel, Lay continued to communicate with the represented person.

Lisa A. Page of Charlotte was reprimanded by the Grievance Committee. She aided a lawyer who does not have a North Carolina law license to engage in the unauthorized practice of law in North Carolina and to improperly represent herself as a specialist in real estate law. Page represented to the State Bar that she was a member of a purported interstate law firm, the Matre Law Firm. In fact, Page had no significant relationship to and no authority over the law firm. Matre, the only lawyer listed on the firm's website, advertised on the website that she could provide legal services in North Carolina.

Petitions for Reinstatement

Scott E. Jarvis, formerly of Asheville and now living in Wilmington, was reinstated to active status by consent order. In September 2001, Jarvis was transferred to disability inactive status by consent after a serious traffic accident left him disabled. ■

Proposed Ethics (cont.)

that particular area of law.

May Lawyer advertise for legal employment in an area of practice when Lawyer does not practice in the area and intends to refer all cases to another law firm?

Opinion #1:

No. Rule 7.1 prohibits a lawyer from making a misleading communication about the lawyer or the lawyer's services. Pursuant to Rule 7.1(a)(1), a communication is misleading if it contains a material misrepresentation of fact or omits a fact necessary to make the statement considered as a whole not materially misleading.

In RPC 217, the Ethics Committee determined that it was misleading for a law firm to include in its advertisements remote call forwarding telephone numbers under the names of towns in which the law firm did not have an office. The opinion provides that listing what appears to be a local telephone number in an advertisement circulated in communities where the law firm does not have an actual presence, without including an explanation in the advertisement that the number is not a local telephone number and that there is no law office in that community, will mislead readers as to the actual location of the offices.

Similarly, advertising specific practice areas in which Lawyer does not currently practice law when lawyer intends to refer cases in those practice areas to other law firms will mislead readers as to Lawyer's capability and/or intention to personally handle legal matters pertaining to the practice areas. Readers will not assume that cases in these areas will be referred or "brokered" to another law firm. Two jurisdictions have recently addressed the issue of lawyers "brokering" cases by amending their Rules of Professional Conduct to specifically prohibit a lawyer or a law firm from advertising that the lawyer or law firm practices in an area of law when that is not the case. *See* Fla. Rules of Prof'l. Conduct R. 4-7.2(c)(4); La. Rules of Prof'l. Conduct R. 7.2(c)(3). These two jurisdictions also require that if a case or matter will be, or is likely to be, referred to another lawyer or law firm, communications regarding the lawyer or law firm's services must include a statement so advising the prospective client. *See* Fla. Rules of Prof'l. Conduct R. 4-7.2(c)(13); La. Rules of Prof'l. Conduct R. 7.2(c)(12)

Advertising specific practice areas in which Lawyer does not currently practice law, with the intention of referring cases in those practice areas to other law firms, is misleading and a violation of Rule 7.1(a)(1).

Inquiry #2:

If Lawyer obtains a case through permissible means, but then refers the matter to another law firm and does not participate in the development or litigation of the matter, may Lawyer accept a portion of the legal fees?

Opinion #2:

Rule 1.5(e) allows for the division of a legal fee between lawyers who are not in the same firm. Lawyer may receive a portion of the legal fees associated with the referred matter so long as the client agrees to the arrangement in writing, the total fee is reasonable, and the fee division is in proportion to the services performed by each lawyer *or each lawyer assumes joint responsibility for the representation.* Rule 1.5(e). The assumption of joint responsibility is an alternative to a division of fees in proportion to the services performed. Comment [8] to Rule 1.5 explains that "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." Therefore, a lawyer who agrees to share legal fees must make reasonable efforts to ensure that the other lawyers who are parties to the arrangement comply with the ethics rules. *See* Rule 5.1. As stated in RPC 205, "whenever a lawyer accepts a fee for referring a case to another lawyer, the lawyer remains responsible for the competent and ethical handling of the matter."

The ABA Committee on Ethics and Professional Responsibility has opined that joint responsibility does not require substantial services to be performed by the lawyer. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 85-1514 (1985). However, joint responsibility does include the same financial and ethical responsibility and the same responsibility to ensure adequate representation and communication as one partner would have for another in similar circumstances. *Id.*

To receive a portion of the legal fees associated with the referred matter, Lawyer must assume joint financial and ethical responsibility for the representation. It is "the ongoing protection of the client's interests" that justifies Lawyer receiving a fee that is disproportionate to the services Lawyer actually provided. *See* Wis. State Bar Comm. on Prof'l. Ethics, Formal Op. E-00-01 (2000).

Inquiry #3:

If Lawyer is entitled to receive a portion of the legal fees associated with the referred matter, what amount/proportion of the legal fee is reasonable?

Opinion #3:

Apart from the requirements that the total fee be reasonable, that the client consent to the fee division, and that each law firm assume joint responsibility for the representation, the Ethics Committee declines to opine on the division of fees between lawyers or law firms. ■

Attorneys Honored with Distinguished Service Awards

The recently created North Carolina State Bar Distinguished Service Award program honors current and retired members of the North Carolina State Bar who have demonstrated exemplary service to the legal profession.

Carlyn G. Poole is a recipient of the State Bar's Distinguished Service Award. Carlyn was born in Taylor, Texas, and obtained her JD with honors from UNC in 1979. Her family law practice with the firm of Tharrington Smith has focused on negotiation and mediation, and she has earned the reputation of being one of the finest and most trusted attorneys in her community and across the state.

Carlyn has a deep commitment to improving the profession and legal education which is visible through her service as an adjunct professor of family law at UNC from 1992-1993 and as a member of the State Bar's CLE Committee, Disciplinary Hearing Commission, and Family Law Specialization Committee. She has also been active with the Bar Association, serving as a member of the Family Law Council, editor and contributor to the *Family Forum*, and chair of the Family Law Section. She frequently appears as a speaker and course planner for continuing legal education programs and also served as managing editor for the first edition of the *North Carolina Marital Claims* deskbook. In 2006, Carlyn was recognized as the NCBA's CLE Volunteer of the Year and received the Joseph Branch Professionalism Award.

Her practice has always emphasized professionalism over business, and she has never failed to treat her clients and opposing counsel with the utmost civility and honesty. Caryln is a true counselor to her clients and uses her intellect and integrity to solve problems in the best possible way rather than trying to "win at all costs."

Thomas C. Morphis Sr. is posthumously awarded the State Bar's Distinguished Service Award. Tom graduated from UNC School of Law in 1972 and spent 35 years in private practice in Hickory before he passed away in May 2009. Tom's leadership in his community was widely admired, and his colleagues considered him an outstanding example of professionalism, civility, and advocacy that was both zealous and creative.

Tom had numerous clients who viewed him as a hero and whose lives were markedly improved by his efforts on their behalf, efforts he continued—sometimes for years—despite some clients' inability to pay. In addition to his remarkable level of care for clients, his interaction with opposing counsel was also consistently characterized by respect and courtesy, which always increased in proportion to the level of rancor in a dispute.

Tom participated in the Chief Justice's Commission on Professionalism, represented the City of Hickory for many years, and was an active member of St. Luke's Methodist Church, serving that congregation as chairman of the Board of Trustees, chairman of the Administrative Council, and co-chairman of the Family Life Center Capital Campaign. Tom is also fondly remembered for his legendary 4th of July picnics, occasions on which he would sometimes feed a couple hundred of his neighbors.

Both of Tom's sons, T.C. and Henry, followed him into the law: three years ago, Henry became an associate in Young, Morphis, Bach & Taylor, Tom's firm. ■

Seeking Distinguished Service Award Nominations

The North Carolina State Bar Distinguished Service Award program honors current and retired members of the North Carolina State Bar throughout the state who have demonstrated exemplary service to the legal profession. Such service may be evidenced by a commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, for example: furthering the public's understanding of and confidence in the rule of law and the justice system; working to strengthen legal education; providing civic leadership to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel; seeking to improve the administration of justice and the quality of services rendered by the legal profession; promoting diversity and diverse participation within the legal profession; providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; encouraging and counseling peers by providing advice and mentoring; and fostering civility among members of the bar.

Awards will be presented in recipients' districts, usually at a meeting of the district bar. The State Bar Councilor from the recipient's district will participate in introducing the recipient and presenting the certificate. Recipients of the Distinguished Service Award will also be recognized in the State Bar *Journal* and honored at the State Bar's annual meeting in Raleigh. Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, www.ncbar.gov. Please direct questions to Carmen Hoyme at the State Bar office in Raleigh, (919) 828-4620. ■

Law School Briefs

All of the law schools located in North Carolina are invited to provide material for this column. Below are the submissions we received this quarter.

Campbell University School of Law

The fall 2009 semester at Campbell Law's new location at 225 Hillsborough Street was extraordinarily busy for students, faculty, and staff as new routines were established for commuting, learning the building layout, and navigating downtown Raleigh. However, once classes started, students and faculty quickly settled down to the real business of Campbell Law: preparing the region's best lawyers to serve their future clients.

Highlights of our first semester included visits from scores of Campbell Law graduates, judges, business groups, and other individuals who came and toured the new home of Campbell Law or hosted events during the fall semester. These events included the NC Supreme Court Historical Society's 2009 Annual Meeting and Gala and town hall-style meetings on the environment and health care.

Student clubs and external partners sponsored numerous guest speakers and events for students and faculty, including Elaine Marshall, North Carolina secretary of state (and member of the Campbell Law class of '81); Bob Edgar, president and CEO of Common Cause; and Michael Dreeben, deputy solicitor general of the United States, Department of Justice, among others.

Campbell Law students are already having an impact in the community through volunteer efforts including the Day of Caring, Pro Bono Week Volunteer Day, and the Campbell Environmental Law Association stream clean up.

Dean Melissa Essary and Campbell Law School were named one of "10 to Watch in 2010" in the January 1, 2010, edition of *The News & Observer* in Raleigh. The list is an annual compilation of people in the Triangle area who bear watching in the year ahead.

The spring semester will continue to be a busy one with several events already scheduled including our Scholarship Luncheon on March 11 and our first graduation ceremony held in Raleigh on May 21.

Charlotte School of Law

On December 18, Charlotte School of Law held a Recognition and Hooding Ceremony acknowledging the achievement of 15 students who completed requirements for graduation at the conclusion of the fall semester. The highlight was the ceremonial hooding of the graduates, with the hoods provided by individual faculty members—symbolizing the passage of knowledge, skills and values from the faculty to the graduates. The commencement speaker was Mr. Art Gallagher, president of Johnson & Wales in Charlotte, and a member of CharlotteLaw's Board of Advisors. Also sharing remarks were Professor Susan Rowe and Ms. Christi Misocky, the valedictorian of the class of December 2009. Dennis Stone, Interim dean of CharlotteLaw, gave the final charge to the class.

This semester CharlotteLaw welcomed Katharine Van Tassel, a visiting professor from Western New England College School of Law who is teaching Evidence and Civil Procedure. Van Tassel received her BSN from Case Western Reserve University, her JD from Case Western Reserve University School of Law, and clerked for US District Court Judge William K. Thomas. Professor Van Tassel is currently completing an MPH at the Harvard School of Public Health. In addition to evidence and civil procedure, Prof. Van Tassel teaches health law, bioethics, food & drug law, torts, and products liability.

The *Charlotte Law Review* will hold its Annual Symposium on Friday, February 26. This year's topic will address the critical issues of energy generation in a carbon-constrained world and the implications of brown fields and vapor intrusion on land development. This topic is of increasing significance to the Charlotte region as it carries out its initiative to become a regional energy hub. A number of distinguished experts on the topic will serve as panelists and moderators. The keynote speaker will be former energy secretary, former US senator, and law professor Spencer Abraham.

Duke Law School

Duke Law launches LLM in Law and Entrepreneurship—Duke Law School is accepting applications for its inaugural LLM class in Law and Entrepreneurship which will get underway in the fall 2010 semester. Ideal for recent JD graduates and early-stage practitioners seeking to specialize, the curriculum blends rigorous academic study relating to the unique legal, business, institutional, strategic, and public policy frameworks and considerations that apply to entrepreneurs and innovation with equally rigorous practice and research opportunities that allow each student to develop skills in representing entrepreneurial clients. James Cox, Duke's Brainerd Currie Professor of Law and an expert in corporate and securities law, is the program's faculty director. For details and applications, see www.law.duke.edu/admis/degreeprograms/llm.

New Duke Law programs focus on "integrated learning"—A number of curricular initiatives add professional-skills training to the core academic curriculum, combining traditional modes of law teaching with problem solving in actual or simulated practice settings. These build on existing curricular offerings such as Duke's legal clinics and the Duke in DC program.

- *The Federal Defender Integrated Domestic Externship program* combines intensive classroom training in federal criminal law and procedure with semester-long student externships in the Office of the Federal Public Defender for the Eastern District of North Carolina.
- *The North Carolina Public Policy Integrated Externship program* places students within state legislative offices and agencies, and is bolstered by a seminar on the state-level public policy process and a course on legislation and statutory interpretation.

■ *The Entrepreneurial Law Clinic* involves law students in assisting startup ventures with the formation of their companies and counseling them with respect to the protection of their intellectual property.

■ *The "course plus" model* adds a one-credit applied law seminar that focuses on case studies onto a traditional "black-letter law" course.

Elon University School of Law

Civil rights forum explores impacts of Greensboro sit-ins—Elon Law's second annual MLK forum, held January 14, evaluated the impacts of the Greensboro sit-ins on the American civil rights movement, two weeks prior to the 50th anniversary of the sit-ins.

Participants included: Franklin McCain, one of the NC A&T students who initiated the sit-ins; Duke University historian William H. Chafe; former general counsel for the North Carolina NAACP Romallus Murphy, and Elon Law professor Faith Rivers James.

McCain said knowing about the injustices of segregation, but doing nothing about it was intolerable to him. "Twenty seconds after I sat on that stool, I had the most wonderful feeling. I had a feeling of self-fulfillment. I had a feeling of dignity 100 feet tall," McCain said.

National survey findings—Measuring responses from more than 26,000 law students across the country, the 2009 Law School Survey of Student Engagement (LSSSE) indicates that Elon Law students are considering ethics in the legal profession more extensively than the national average.

Specific findings from the survey include:

■ 88% of first-year Elon Law students report the law school environment encourages the ethical practice of law, compared with 79% nationally,

■ 70% of second-year Elon Law students report working to develop a personal code of values and ethics while at law school, compared with 49% nationally.

The survey also found that 88% of second-year Elon Law students have done volunteer or *pro bono* work, or plan to, compared to 77% nationally.

Elon Law students win pro bono award—Forty-three students from Elon University School of Law were recognized on November 19 with the Greensboro Bar Association's annual *pro bono* award for providing free tax return assistance to elderly and low-income residents of Greensboro.

Visit law.elon.edu for complete reports on the forum, survey findings, and the *pro bono* award.

North Carolina Central University School of Law

Anniversary—The law school celebrated its 70th Anniversary in September with a grand gala and banquet that attracted alumni from throughout the region, many of whom are historic figures in the legal profession. Sammie Chess, Class of 1958, the first African American Special Superior Court judge in North Carolina; Leroy Johnson, Class of 1957, the first African American member of the Georgia Senate post reconstruction; and H.M. "Mickey" Michaux Jr., Class of 1964, the first African American to serve as a United States attorney in the South were just some of the many distinguished graduates in attendance. The event was an unquestioned success and symbolized a bright future for the institution based on a strong and proud foundation.

Rankings—*National Jurist Magazine* and *Pre Law Magazine* ranked NCCU School of Law number one as the Best Value Law School in the nation based on affordability, bar passage, and job placement. This marks the second consecutive time the law school has received this number one designation.

Faculty scholarship—NCCU Law Professors Reginald Mombrun and Felicia Branch, along with Professor Gail Levin Richmond of the NOVA Southeastern University Law Center, have co-authored *Mastering Corporate Tax*, a book that covers every major corporate tax topic and is a useful aid for students taking their first corporate tax class and for the advanced student taking a corporate reorganization course or an advanced corporate tax topics seminar. The book is published by Carolina Academic Press.

Study Abroad program—In November, The Foreign Programs Sub-Committee of the American Bar Association Accreditation Committee approved the NCCU School of Law Foreign Summer Program in San Jose, Costa Rica. The program features an interdisciplinary law course (Comparative Biotechnology, Bioethics, and Policy) and is part of the law school's Biotechnology and Pharmaceutical Law Institute.

University of North Carolina School of Law

Reader privacy symposium—The school, the Kathrine R. Everett Law Library, and the UNC Center for Media Law and Policy presented a symposium that addressed the tension between readers' expectations of privacy and the interest of private entities that data-mine the reader information online.

Adversarial systems—UNC will host a conference on the future of adversarial systems worldwide on April 6, 2010. The event will be held at the FedEx Global Education Center.

Environmental law—The school launched the Center for Law, Environment, Adaptation, and Research under the directorship of Professor Victor Flatt. Flatt, who attended the Climate Change Conference in Copenhagen, also recently hosted Annabelle Malins, the UK's consulate general for the Southeast United States.

Website—UNC School of Law launched a new and improved website at www.law.unc.edu. Among the many offerings, it has a section for prospective students to sort academic offerings, student organizations, events, news, and faculty scholarship by area of legal interest.

Continuing legal education—The annual Festival of Legal Learning offered up to 12 credits toward continuing learning education requirements to more than 600 attendees in February. Spring events include the Banking Institute, March 25-26, in Charlotte, and the J. Nelson Young Tax Institute, April 29-30, at UNC.

Student named to Equal Justice Works Board—Second-year law student Meagan Mirtenbaum has been named to the Equal Justice Works Board of Directors for a three-year term. She joins national leaders from law firms, law schools, corporate legal departments, and the public sector to work for equal justice on behalf of underserved communities and causes.

Wake Forest University School of Law

Wake Forest School of Law Associate Professor Omari Simmons is among the 47 newly elected members of The American Law Institute. Election is considered one of the highest honors in the legal profession,

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Client Security Fund Reimburses Victims

At its January 14, 2010, meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $3,427.50 to five clients who suffered financial losses due to the misconduct of North Carolina lawyers. The board also reconsidered a claim determined in October 2009 and reduced the claim by $571.49.

The new payments authorized were:

1. An award of $991 to a former client of D. Bernard Alston of Henderson. The board found that Alston was retained to represent the client on a criminal charge. Alston failed to provide any valuable legal services for the fee paid. Alston was suspended on June 23, 2008.

2. An award of $291.50 to an applicant who suffered a loss from a real estate closing handled by Roger Cardinal of Charlotte. The board found that Cardinal handled a refinance closing for a client and issued a check to the applicant as a disbursement from that closing. The checks Cardinal issued from the closing failed to clear before the State Bar froze Cardinal's trust account due to his misappropriation. Cardinal's trust account balance was insufficient to pay all his clients' obligations due to his misappropriation. Cardinal was disbarred on December 26, 2008. The board previously reimbursed eight other Cardinal clients a total of $38,188.31.

3. An award of $395 to a former client of Daniel Fulco of Charlotte. The board found that Fulco handled a real estate closing for a client. Fulco failed to make all the proper disbursements from the closing proceeds. Fulco's trust account balance was insufficient to pay all his clients' obligations due to his misappropriation. Fulco was disbarred on August 13, 2007.

4. An award of $1,000 to a former client of Fredrick Pierce of Raleigh. The board found that Pierce was retained to represent a client on a criminal charge. Pierce was unable to provide any valuable legal services for the fee paid since his license was already suspended. Pierce was suspended on February 27, 2009. The board previously reimbursed three other Pierce clients a total of $2,250.

5. An award of $750 to a former client of Fredrick Pierce. The board found that Pierce was retained to represent a client on a criminal charge. Pierce failed to provide any valuable legal services for the fee paid.

Upon reconsideration of a claim determined last quarter in which an award of $55,727.46 was made to former clients of Michelle Shepherd of West Jefferson, the board determined that two items relating to the award should be adjusted for a net reduction of $571.49. ■

Law School Briefs (cont.)

according to ALI President Roberta Cooper Ramo, and its members are elected through a highly selective process. "We choose individuals who have made significant professional achievements, demonstrated leadership and promise, and who are interested in carrying out our purposes 'to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work,'" Ramo said. Simmons' research interests include corporate governance and politics. Prior to joining the faculty in 2006, he worked as corporate counsel for two multinational corporations and as an associate at the law firm of Wilmer, Cutler and Pickering in Washington, DC.

Shannon Gilreath, Wake Forest Fellow for the Interdisciplinary Study of Law, has received a three-year cross-appointment to the core faculty of the university's Women's and Gender Studies Department as professor of Women's and Gender Studies. Gilreath will develop and teach three courses over the course of three years as part of the Women's and Gender Studies curriculum. One of those courses is "Introduction to Women's and Gender Studies," a once-per-week course for undergraduate students. This is a course traditionally team-taught with another professor in freshman seminar style. The graduate classes, which will focus on gender and sexuality, will be cross-listed between the law school and the graduate school. Gilreath will begin teaching the courses during the 2010-2011 academic year.

Wake Forest School of Law Clinical Professor Kate Mewhinney has been certified by the North Carolina State Bar as a specialist in elder law. Mewhinney, who manages the law school's Elder Law Clinic, was appointed in January 2008 to chair the first Elder Law Specialty Committee of the NC State Bar Board of Legal Specialization. In November, the board announced the names of the certified elder law specialists. Professor Mewhinney has also been certified by the National Elder Law Foundation since 1995, in its charter group of specialists. ■

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